Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

U.S.A. POLYMER CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the significant passage of time and other evidence of changed circumstances, such as employee turnover and a change in workplace conditions, are sufficient grounds for the National Labor Relations Board or a court to decline the issuance of or deny the enforcement of a *Gissel* bargaining order and direct an election be held.

2. Whether evidence of the passage of time and changed conditions should be presented after the National Labor Relations Board's decision or order and if not, when such evidence should be presented for the National Labor Relations Board or a court's review.

3. Whether the National Labor Relations Board may issue a *Gissel* bargaining order in favor of a new union, separate and distinct from the union selected by company employees, potentially defeating the contemporary interests of affected employees.

PARTIES TO THE PROCEEDINGS

Petitioner

1. The Petitioner in this case is U.S.A. Polymer Corporation. Petitioner is not related to any other publicly held or publicly-traded companies.

Respondent

2. Respondent is the National Labor Relations Board.

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Defendant-Appellant U.S.A. Polymer Corp. ("Polymer") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

DECISIONS BELOW

The opinion of the Court of Appeals is reported at 272 F.3d 289 (5th Cir. 2001), and is reproduced in Appendix B. The decision and order of the National Labor Relations Board (the "Board") is reported at 328 NLRB 1242 (1999), and is reproduced in Appendix C. The Court of Appeals' order denying the petition for panel rehearing is unreported and is reproduced in Appendix A.

JURISDICTION

The jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked under 29 U.S.C. § 160(e) and the judgment was entered on November 6, 2001. The Court of Appeals denied Petitioner's timely petition for panel rehearing on January 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Board's issuance and the Fifth Circuit's enforcement of a *Gissel* bargaining order in this case is wholly inappropriate.[1] A *Gissel* bargaining order is an extreme remedy that should only be used when traditional remedies, such as an election, are insufficient. The propriety of issuing

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[1] The *Polymer* decision issued a *Gissel* bargaining order, as described in *NLRB v. Gissel,* 395 U.S. 575 (1969).

a *Gissel* bargaining order must be evaluated by the Board in light of the circumstances that exist at the time the bargaining order is issued. In the present case, the Board improperly issued a *Gissel* bargaining order based on a stale set of facts that reflected Polymer's workplace in 1995, more than four years prior to the Board's entry of a bargaining order. Subsequent to the Board's entry of the *Gissel* bargaining order, Polymer filed a Motion for Reconsideration and to Reopen the Record or for Rehearing with the Board (the "Motion to Reopen"). App. at 161a-177a.[2] Polymer filed the Motion in order to demonstrate that because of the significant time that passed while the case was before the Board, and the change in conditions that took place during that time, any remaining affects of the alleged unfair labor practices had dissipated, and a fair election could be held. The Board refused to consider this evidence, and denied the Motion to Reopen as untimely. App. at 6a. Upon the Board's application for enforcement of the bargaining order, Polymer submitted the evidence of passage of time and changed circumstances to the Fifth Circuit. However, the Fifth Circuit also refused to consider such evidence, and enforced the bargaining order against Polymer. The Fifth Circuit also declined to accept Polymer's argument that the bargaining order should not be enforced on behalf of a new and different union, distinct from the union selected by Polymer's employees.[3] App. at 3a-17a.

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[2] Appendix citations appear in the form "App. at X" with "X" referring to the page number of the Appendix.

[3] After the Polymer employees signed the authorization cards, International Ladies' Garment Workers Union ("ILGWU") began the process of merging with the Amalgamated Clothing and Textile Workers ("ACTWU") to form the Union of Needle Trades, Industrial and Textile Employees ("UNITE"). UNITE was created

A. *Statement of Facts*

Polymer began operation in November 1992, as a small, one-facility recycling business in Houston, Texas. App. at 4a, 41a. The Company engaged in the business of recycling used plastic containers into plastic pellets that could, in turn, be used to produce new consumer products. App. at 4a. At its inception, Polymer employed 64 people, reaching a peak workforce of 92 in February 1994. App. at 4a-5a, 41a. When the union filed unfair labor practice charges in 1995, the Company employed approximately 68 non-supervisory employees. App. at 5a.

Since opening its doors Polymer has been unprofitable. App. at 44a. From January 1994 through June 1995, Polymer lost $646, 677. App. at 82a. Numerous problems in the marketplace plagued Polymer's efforts, as well as those of its competitors, in the post-consumer recycling industry. App. at 89a-92a. Changes in the regulations governing the post-consumer recycling industry resulted in increased prices and a shortage of raw materials needed to produce the recycled product. App. at 90a-91a.

By mid-January 1995, the continued high price and limited availability of raw materials prevented Polymer from operating profitably. App. at 83a-88a. Because of these economic pressures, Polymer carried out a reduction in force.

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on July 1, 1995. In the initial action, Case No. 16-CA-17189, ILGWU was the Charging Party. On August 28, 1995, the Regional Director issued a second complaint, Case No. 16-CA-17455, which listed UNITE as the Charging Party. The Board consolidated the two cases on September 15, 1995. App. at 4a, 40a.

Id. In the initial reduction in force, 29 employees were released. App. at 5a, 44a. In July 1995, Polymer's mounting losses required that an additional 10 employees be released. App. at 5a, 125a. In response to the layoffs in January 1995, the ILGWU brought charges against Polymer with the Board, a complaint was issued, and the current dispute ensued. App. at 5a, 45a. Although the Administrative Law Judge found that Polymer's reduction in force in January 1995 was unlawful as motivated by union animus, the Administrative Law Judge held that the July 1995 layoff was driven by legitimate business needs and not by union animus. App. at 108a, 131a.

During the more than four and one-half year delay between the actions leading to the unfair labor practices allegations in 1995 and the August 24, 1999 bargaining order, the actors and the workplace at Polymer dramatically changed. App. at 163a-65a, 172a, 175a-76a. For example, Polymer increased the level of automation in its production process, which caused a reduction of its workforce by 30 people. App. at 175a. Positions such as "material handlers" were no longer necessary because the new automated systems transferred materials between the grinding and washing phases of production on its own. App. at 175a-76a. In addition, Polymer decided to largely discontinue its unprofitable plastic recycling business, and began manufacturing an entirely new and distinct product, plastic slip sheets. App. at 176a. Polymer also experienced a change in ownership and a corporate reorganization and experienced more than 650% employee turnover since the organizing campaign of late 1994 and early 1995. App. at 172a, 175a-76a.

Despite the many changes at Polymer and the extensive passage of time during the case's pendency before the Board, the Board issued the *Gissel* bargaining order. The

Board's decision forces the current Polymer employees to be represented by a union not in existence at the time the former Polymer employees signed their authorization cards, a union that likely does not reflect the desires of Polymer's present workforce. Indeed, even if the passage of time and changed circumstances evidence had been properly considered by the Board, the Board's 1999 bargaining order remains improper because the union listed on the authorization cards signed by the employees in 1999 (the ILGWU) no longer exists. The Board issued the *Gissel* bargaining order despite the almost uniform holdings of the Circuit courts (including an earlier Fifth Circuit decision), which state that the passage of time and changed circumstances are directly relevant when determining whether a bargaining order is the appropriate remedy.

B. *Proceedings Below*

The Board's General Counsel, acting on charges filed by the Texas-Oklahoma-Arkansas District Counsel of the ILGWU, issued a complaint against Polymer on March 21, 1995. App. at 5a. Administrative Law Judge Wallace Nations in Houston, Texas heard the complaint from June 5, 1995 through June 21, 1995. *Id.* A second hearing was held October 17 through October 18, 1995. *Id.*

On March 25, 1996, Administrative Law Judge Nations issued a decision finding that Polymer had violated Sections 8(a)(1), (3) and (4) of the National Labor Relations Act ("NLRA"). App. at 5a, 18a. Polymer timely filed exceptions to that decision on May 10, 1996. App. at 5a. On August 24, 1999, more than four years after the initial hearing in this case, and three years after the Administrative Law Judge's decision, the Board issued a Decision and Order. *Id.* Among the holdings of the Board, Polymer was ordered to

bargain with UNITE as the duly designated representative of the employees pursuant to *NLRB v. Gissel*, 395 U.S. 575 (1969).[4] App. at 6a.

Following the Board order, on September 24, 1999, Polymer filed its Motion to Reopen. App. at 161a.[5] In that motion, Polymer provided the Board with new evidence of events occurring during the four years this case languished at the Board. App. at 161a-77a. Such evidence establishes that a bargaining order is an improper remedy.

On October 5, 1999, Polymer received a letter from Richard D. Hardick, Associate Executive Secretary to the Board, informing Polymer that the Motion to Reopen was being considered untimely and would not be "forwarded to the Board for consideration."[6] App. at 190a-91a. On October 8, 1999, Polymer sent a letter to Associate Secretary Hardick and simultaneously filed a Supplemental Motion to Reopen, contesting the validity of Associate Secretary Hardick's decision not to forward the original Motion to Reopen to the

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[4] In *Gissel*, the Supreme Court recognized that an employer may, under limited circumstances, be ordered to bargain with a union if unfair labor practices preclude the holding of a fair election, where the union has shown convincing support by possession of cards signed by a majority of the employees authorizing the union to represent them. *See Gissel*, 395 U.S. at 597.

[5] In accordance with the language of 29 C.F.R. § 102.48 (2000), Polymer moved to reopen the record "after the Board decision or order."

[6] As discussed below, Polymer contends that the Motion to Reopen was properly before the Board.

Board for proper consideration. App. at 192a-98a. On November 23, 1999, after both parties submitted their arguments in support of their positions, a divided Board, with Member (now Chairman) Hurtgen dissenting, ordered that Polymer's Motion to Reopen would not be considered. App. at 6a.

On March 6, 2000, the Board filed an application for enforcement with the Fifth Circuit seeking enforcement of its August 24, 1999 Order. App. at 6a-17a. In the opinion issued on November 6, 2001, the Fifth Circuit granted the Board's application for enforcement. App. at 3a-17a. On December 20, 2001, Polymer filed its Petition for Panel Rehearing. App. at 186a. Polymer urged the following arguments: (1) the Fifth Circuit failed to adequately consider the long and unjustified delay of the Polymer case before the Board; (2) a bargaining order should not be enforced on behalf of a separate and distinct union; and (3) there is no clear standard regarding how evidence of passage of time and changed circumstances should be presented to the Board. On January 8, 2002, the Fifth Circuit denied Polymer's Petition for Panel Rehearing, and issued its mandate on January 16, 2002. App. at 186a-87a. On February 14, 2002, Polymer filed a Motion for Partial Recall and Stay of Mandate. App. at 187a. Polymer seeks review from this Court on the appropriateness of the issuance of the *Gissel* bargaining order.

REASONS FOR GRANTING THE WRIT

As the Fifth Circuit acknowledged in its *Polymer* decision, "[t]he Federal Circuit courts are almost unanimous in holding that the Board must take current conditions into account when it determines whether to issue a bargaining order under *NLRB v. Gissel Packing Co.* 395 U.S. 575 (1969)." App. at 7a. The Fifth Circuit went on to note that all Circuits except the Ninth take current conditions into account when deciding whether to enforce *Gissel* bargaining orders. App. at 7a. Before the *Polymer* decision, there was a split between the Ninth Circuit and all other Circuit courts that have addressed the issue regarding whether current conditions should be considered. The District of Columbia, Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuits have all held that the passage of time and changed circumstances are directly relevant when determining whether to issue a bargaining order. By refusing to consider the effect of the passage of time and changed circumstances in this case, the Fifth Circuit appeared to now align itself with the Ninth Circuit. At the very least, the Fifth Circuit refused to consider the fact that the significant passage of time may defeat all contemporary interests. Moreover, the passage of time is a fact that the Board or the Court may take notice of on their own--the party arguing for denial of a bargaining order need not argue it because the fact that a significant amount of time has passed speaks for itself.

In issuing its enforcement of the *Gissel* bargaining order, the Fifth Circuit also acknowledged that "despite the weight of the law in other Circuits, the law on this point in the Fifth Circuit is somewhat confused." App. at 9a. Over the past few decades, the Fifth Circuit has been inconsistent in its treatment of bargaining orders issued after a significant passage of time and changed circumstances. In 1970, the

Fifth Circuit held that the Board must consider current circumstances when determining whether to issue a bargaining order. *See NLRB v. American Cable,* 427 F.2d 446 (5th Cir. 1970). In 1980, the Fifth Circuit stated that the Court should evaluate the appropriateness of a bargaining order as of the date of the unfair labor practice proceedings. *See NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 497 n.7 (5th Cir. 1980). In 1991, the Fifth Circuit reversed direction and remanded a case to the Board where it failed to consider the passage of time. *See Texas Petrochemicals Corp. v. NLRB,* 923 F.2d 398, 401 (5th Cir. 1991). With *Polymer*, the Fifth Circuit reversed itself again by declining to consider the effects of the passage of time. App. at 3a-17a.

In recent years, the Board has also repeatedly issued conflicting decisions. In some cases, the Board has declined to issue bargaining orders after a significant passage of time. *See, e.g., Audubon Reg'l Med. Ctr.*, 331 NLRB No. 42 (2000); *Cooper Hand Tools, A Div. of Cooper Indus., Inc.*, 328 NLRB No. 21 (1999). However, in *Polymer*, the Board issued a bargaining order, despite the four years that passed while the case was before the Board. App. at 18a-19a. Because of the uncertainty regarding these issues at the Board and Circuit court level and the split among the Circuits, the need for guidance from the Court is crucial. This case is a rare and timely opportunity to provide this guidance, or the Board and Circuit courts will continue to confuse an already complicated issue. Moreover, the Court's opinion is needed to explain when companies should present evidence of the passage of time and changed conditions to the Board. In addition, the Court should grant this Petition because clarity is needed as to whether the Board may issue a bargaining order on behalf of a new union, a union different from the one selected by employees.

I. The Passage of Time and Current Conditions are Factors that Should be Considered when Determining Whether to Issue a *Gissel* Bargaining Order

A. *Many Circuit Courts Consider the Passage of Time Sufficient to Deny Enforcement of a Gissel Bargaining Order*

During the course of the *Polymer* proceedings, the Board and the Fifth Circuit failed to give adequate consideration to the significant amount of time that passed between the allegations of unfair labor practices against Polymer in 1995 and the Board's decision in 1999. There have been a number of recent cases before the Board and Circuit courts where bargaining orders were either not issued or not enforced because of the passage of a significant amount of time between the unfair labor practices and the issuance of a bargaining order.

A number of Circuit courts have held that the Board must consider the effects of the passage of time when deciding whether to issue a bargaining order. The Second, Fifth, Seventh, and District of Columbia Circuit courts have all denied enforcement of bargaining orders and remanded cases to the Board so that the effects of the passage of time could be considered. *See Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166 (D.C. Cir. 1998); *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398 (5th Cir. 1991); *Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990); *NLRB v. Knogo Corp.*, 127 F.2d 55 (2d Cir. 1984). These courts hold that the passage of time is directly relevant to the adequacy of traditional remedies, such as an election, and therefore should be considered when determining the appropriate remedy for

allegations of unfair labor practices. *See id.* Passage of time is relevant because the negative effect of unfair labor practices may have dissipated during the considerable lapse of time between the occurrence of alleged unfair labor practices and the issuance of a bargaining order. *NLRB v. Jamaica Towing Co.*, 632 F.2d 208 (2d Cir. 1980). Moreover, a union may no longer retain majority status if a significant amount of time has passed. *See id.* The Fifth Circuit also remanded a case where the Board refused to ascertain the employees' current desires after fours years passed between the Administrative Law Judge's decision and the Board's decision. *Texas Petrochemicals Corp.*, 923 F.2d at 401. In *Texas Petrochemicals Corp.*, the Court remanded the case to the Board because of the Board's "unprovoked and inordinate delay in deciding the case...." *Id.*

More than four and a half years passed between the time the unfair labor practices allegations were brought against Polymer and the time of the Board's decision. This unexplained delay was not due to any delay on Polymer's part; the Board was entirely responsible for the lapse of time. Any remaining effects of the alleged unfair labor practices dissipated in the period of time that the decision languished before the Board. The Fifth Circuit ignored the delay in the *Polymer* decision, the different climate presently at Polymer compared with the climate in 1995, and the weight of other Circuit courts, (including its own precedent) by enforcing the *Gissel* bargaining order against Polymer. The Fifth Circuit's inconsistent opinions, coupled with the decisions of other Circuits, make this issue ripe for consideration by this Court.

B. *The National Labor Relations Board Occasionally Considers the Passage of Time Sufficient to Deny the Issuance of a Gissel Bargaining Order*

Some recent Board decisions have also held that the passage of time is sufficient to deny a *Gissel* bargaining order. Five Board decisions were issued in 1999 and 2000, all of which addressed allegations of unfair labor practices similar to those at Polymer. The Board issued all five of these decisions shortly before or shortly after its decision in *Polymer*. In all five cases, the Board declined to issue a bargaining order, stating that it was unlikely a court would enforce the orders because of the long delay at the Board. In *Audubon Reg'l Med. Ctr.*, 331 NLRB No. 42 (2000), more than four years had passed since the union initially petitioned the company for recognition. The Board declined to issue a bargaining order because such an order would likely be unenforceable in the courts due to the long delay at the Board. In *Cooper Hand Tools, A Div. of Cooper Indus., Inc.*, 328 NLRB No. 21 (1999), the Board again declined to issue a bargaining order, holding that such an order would likely be unenforceable because of the more than three year delay at the Board. In *Comcast Cablevision of Philadelphia, L.P.*, 328 NLRB 487 (1999), the Board held that the bargaining order was unenforceable because of a three and a half year Board delay. In *Regal Recycling, Inc.*, 329 NLRB No. 38 (1999), the Board again recognized that courts will not enforce a bargaining order where there has been a significant passage of time (four and one half years) between the alleged unfair labor practices and the issuance of the bargaining order. The Board found that the employees' interests were best served by an election. In *Wallace Int'l de Puerto Rico, Inc.*, 328 NLRB No. 3 (1999), the Board again declined to issue a bargaining

order because of the long and unjustified delay before the Board.[7]

The Board decisions in *Comcast*, *Cooper Hand Tools*, and *Wallace International* were issued in 1999, shortly before the Board's decision in *Polymer*. Like the *Polymer* decision, these decisions all involved three to four year delays at the Board. In all three decisions, the Board declined to issue a bargaining order because of the Board's "long and unjustified delay in processing the case," which would likely render a bargaining order unenforceable. *See id.* The Board stated that "rather than engender further litigation and delay over the propriety of a bargaining order, we believe that employee rights would be better served by proceeding directly to a second election." *See id.*

In September 1999, the Board issued its decision in *Regal Recycling*, approximately five years after the Administrative Law Judge's decision. In 2000, the Board issued its *Audubon Reg'l Med. Ctr.* decision, approximately three years after the Administrative Law Judge's decision. Both of these decisions, issued shortly after the *Polymer* decision, involved allegations of unfair labor practices similar to *Polymer*. However, despite the finding of hallmark unfair labor practices, the Board declined to issue a bargaining order because of the lengthy and unexplained delay at the Board, and stated that an election would better serve the employees.

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[7] Perhaps most importantly, there is no mention of a Motion to Reopen in the *Regal Recycling* and *Wallace International* decisions. At least on occasion, the Board in recent years has considered the passage of time on its own, without the company filing a Motion to Reopen.

Despite the temporal proximity of these Board decisions, the Board has never explained why it reached a different result in *Polymer*. Nor did the Fifth Circuit seek an explanation as to why similar facts produced schizophrenic outcomes. The Fifth Circuit also ignored other Circuits, that have held that the passage of time must be considered when deciding whether to enforce a bargaining order, to ensure that employees' contemporary interests are protected. This Court should grant Polymer's petition to resolve these conflicts at the Board and Circuit court levels, and correct the Fifth Circuit's error.

C. *Other Circuit Courts Have Required the Board to Consider the Effects of the Passage of Time and Changed Circumstances on the Appropriateness of a Gissel Bargaining Order*

When a significant passage of time between the unfair labor practices and the Board's issuance of a *Gissel* bargaining order is coupled with a change in circumstances at the workplace, there is significant case law in favor of elections instead of a *Gissel* bargaining order. Many Circuit courts have refused to enforce *Gissel* bargaining orders where extensive changes have taken place at the workplace while the cases were stalled at the Board. *See Overnite Transp. Co. v. NLRB*, No. 99-2494 and No. 00-1065, 2002 U.S. App. LEXIS 2214 (4th Cir. Feb. 11, 2002); *Charlotte Amphitheater Corp. v. NLRB,* 82 F.3d 1074, 1078 (D.C. Cir. 1996); *J.L.M., Inc. v. NLRB,* 31 F.3d 79 (2d Cir. 1994); *NLRB v. Cell Agric. Mfg. Co.*, 41 F.3d 389 (8th Cir. 1994); *Camvac Int'l, Inc. v. NLRB*, 877 F.2d 62 (6th Cir. 1989). As stated earlier, the Board is to determine the appropriateness of a *Gissel* bargaining order in light of circumstances at the workplace at the time the bargaining order is issued. *See American Cable*

Sys., 427 F.2d at 448-49 (holding that "no bargaining order should be issued unless at the time the Board issues such order it finds the electoral atmosphere unlikely to produce a fair election"). In deciding whether to issue a *Gissel* bargaining order, the Board therefore must consider circumstances that may have changed during the pendency of the matter before the Board. *See Cell Agric. Mfg. Co.*, 41 F.3d at 398. The Board should consider such critical factors as turnover in the workforce and change in management, as well as the passage of time. *See Impact Indus., Inc. v. NLRB*, 847 F.2d 379 (7th Cir. 1988) (enforcement denied after more than seven year delay and 87 percent workforce turnover and change in management).

Recently, in *Overnite Transportation Co.*, the Fourth Circuit overturned the Board's issuance of a *Gissel* bargaining order, and ordered new elections at four Overnite service centers. *See Overnite Transp. Co.*, 2002 U.S. App. LEXIS 2214. Although the Court agreed with the Board that there were numerous unfair labor practices, the Court held that the requirements for a *Gissel* bargaining order were not met because the passage of time (and employee turnover) were "improperly ignored by the Board as irrelevant." *See id.* at *51. The majority further stated:

> by so limiting its consideration of the events following the unfair labor practices, the Board cannot make the necessary and detailed findings about the possibility of conducting a fair election years after the unfair labor practices occurred...Moreover, and perhaps more importantly, in taking this position, the Board refuses to follow the clear and established precedent of this Circuit that both the passage of time and employee turnover are

highly relevant matters to be considered.

See id. at *51-52.

During the four years the Board delayed in issuing its case in *Polymer,* Polymer experienced a tremendous amount of employee turnover, a complete change in management, and also introduced a new product which utilized different machinery and processes altogether. The current conditions at Polymer are drastically different now than they were seven years ago at the time of the unfair labor charges. However, the Fifth Circuit failed to consider these changed current circumstances. Thus, this Court should grant Polymer's petition to resolve the split in the Circuits and to emphasize the importance of considering a change in workplace conditions over the passage of time to ensure that the extraordinary remedy of a *Gissel* bargaining order is issued only in those circumstances where a fair election remains impossible.

II. There is No Clear Standard Regarding How Evidence of Passage of Time and Current Conditions should be Presented to the National Labor Relations Board

A. *The Board and Fifth Circuit's Interpretation of the National Labor Relations Board's Rules and Regulations is Flawed*

In its opinion, the Fifth Circuit upheld the Board's decision to deny Polymer's Motion to Reopen as untimely. The Fifth Circuit further stated that it was "not the Board's responsibility to continually update the factual picture that the parties have provided," and that "the party that seeks to

benefit from demonstrating a change of circumstances bears the burden of timely providing the Board with evidence of those changes." App. at 14a. The Fifth Circuit went on to assert that "the Board is entitled to assume, in the face of the parties' silence, that the facts as initially presented continue to adequately describe the employer's workforce." *See id.* These statements by the Fifth Circuit, as well as the Board's actions, suggest that an employer is under a continuous obligation to supplement the factual record while a case is pending before the Board. This suggestion is unsupported by authority and directly contradicts the plain language of Section 102.48(d)(1)-(2) of the Board's Rules and Regulations. 29 C.F.R. § 102.48 (2000).

Section 102.48(d)(1) states that "[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record *after the Board decision or order.*" Section 102.48(d)(1) also requires that "[a] motion to reopen the record shall state...why [the evidence sought to be introduced] would require a different result." The Board asserted that Polymer should have filed its Motion to Reopen sometime between the time the charge was brought in 1995 and the time the Board issued its decision in August 1999. App. at 14a-15a. In its opinion, the Fifth Circuit affirmed this assertion. *Id.* However, the Board's assertion and the Fifth Circuit's affirmation contradict what the Board's own Rules and Regulations require.

In upholding the Board's refusal to reopen the record, the Fifth Circuit stated that Section 102.48(d)(2) obligated Polymer to continually update the factual record during the pendency of the case before the Board. App. at 14a. In relevant part, the regulation states that "[a]ny motion pursuant to [Section 102.48] shall be filed within 28 days, *or such*

further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence." However, the Board's interpretation of Section 102.48(d)(2) is flawed. Namely, the Board's reading completely eviscerates the language of Section 102.48(d)(1) which states that a motion to reopen the record should not be filed until "after the Board decision or order." 29 C.F.R. § 102.48(d)(1). The Board's interpretation of Section 102.48(d)(2), which the Fifth Circuit upheld, would only serve to encourage delay, because each party would be forced to continually update the factual record during the long years the case was before the Board. In addition, although the Fifth Circuit stated that the Board should take "current" conditions into account when determining whether to issue a bargaining order, the Fifth Circuit does not explain the term "current." App. at 16a. The Fifth Circuit does not connect "current" to any particular point in time--does "current" refer to conditions after the Administrative Law Judge's decision, sometime during the Board's proceedings, or the present? Logically, it seems that "current" would mean the "present." Indeed, under the Board's reading of Section 102.48, an employer will always be unsuccessful in its attempt to introduce new evidence to the Board: if the employer abides by Section 102.48(d)(1), and waits until after the Board's decision or order to file its motion to reopen, the evidence contained in the motion would likely be precluded by the Board's interpretation of Section 102.48(d)(2), which is that the motion should have been filed at some earlier time. At the very least, the Board and Fifth Circuit's reasons for refusing to consider the evidence in Polymer's Motion to Reopen ignore the passage of time, a fact that stands on its own and need not be asserted in a Motion to Reopen. Moreover, the reasoning overlooks the injustice that could result by enforcing a bargaining order

where an election would produce a fair result and would provide greater protection to contemporary interests.

B. *The National Labor Relations Board and Circuit Courts' Treatment of Motions to Reopen is Inconsistent*

In addition to the confusion resulting from the Board's interpretation of its own Rules and Regulations in the *Polymer* case, additional Board and other Circuit court decisions only further cloud the issue. A review of other Board and Circuit court decisions indicates that there is no clear identifiable time when evidence of the passage of time and changed circumstances should be presented to the Board. In some situations, evidence was presented before the Board issued its decision. *See Flamingo Hilton-Laughlin*, 148 F.3d 1166; *Charlotte Amphitheater Corp.*, 82 F.3d 1074. However, even where the company presented evidence of passage of time and changed circumstances during the Board proceedings, this evidence was disregarded by the Board. In the two cases above, the D.C. Circuit remanded to the Board so that the passage of time and evidence of changed circumstances could be more thoroughly evaluated. *See id.* Upon remand, the Board withdrew the bargaining orders, holding that because of the passage of time and changed circumstances, a bargaining order would likely be unenforceable.

In other similar Board proceedings, companies requested a motion to reopen the record after the Board issued its decision (in accordance with the Board's Rules and Regulations), in order to introduce evidence of the passage of time and changed circumstances. As in *Polymer*, the Board denied all these motions and ignored the relevant evidence. *See Montgomery Ward & Co.*, 904 F.2d 1156; *Camvac Int'l, Inc.*, 877 F.2d 62; *Krogo Corp.*, 127 F.2d 55; *NLRB v. Pace*

Oldsmobile, Inc., 739 F.2d 108 (2d Cir. 1984). The Courts in *Montgomery Ward*, *Camvac*, *Knogo* and *Pace Oldsmobile* all remanded the cases to the Board, stating that evidence of passage of time and changed circumstances should have been considered. These cases were remanded even where the motions to reopen were filed beyond the 28 days provided in 29 C.F.R. 102.48. In *Knogo*, the Board issued the bargaining order on July 27, 1982 and Knogo did not file its Motion to Reopen until November 10, 1982 (three and a half months later). Although the Board denied the Motion, the Court ultimately remanded to the Board so that evidence regarding the passage of time and changed circumstances could be considered. *See Knogo Corp.*, 127 F.2d 55. In *Pace Oldsmobile*, the Board issued its decision on December 16, 1982. Pace Oldsmobile filed a Motion to Reopen nine months later, on August 18, 1983, which was denied. Upon the Board's application for enforcement, however, the Court declined to enforce the bargaining order because the Board failed to consider evidence of changed circumstances and passage of time. *See Pace Oldsmobile, Inc.*, 739 F.2d 108. Most importantly, in the *Texas Petrochemicals* decision, the Fifth Circuit, despite the untimeliness of the Motion to Reopen, remanded to the Board with instructions to consider the current conditions at the company in order to determine if a bargaining order was appropriate. *See Texas Petrochemicals Corp.*, 923 F.2d 398.

In addition, the General Counsel of the Board outlined criteria in a recent Memorandum that the Board considers relevant when "determining whether to impose a *Gissel* bargaining order remedy." General Couns. Mem. 99-8, at 2 (November 10, 1999). The General Counsel listed the "change in circumstances after the violations" as a relevant factor. *See id.* The General Counsel conceded that "the courts are almost unanimous in requiring that the Board

consider the relevance of changed circumstances. The Ninth Circuit is the only circuit which does not require the Board to consider post-hearing changed circumstances." *See id.* at n.48. However, the General Counsel also acknowledged that "the Board generally denies respondent's motions to reopen the record to consider such evidence." *See id.*

By refusing to consider the evidence of the passage of time and changed circumstances at the Polymer facility, the Board disregarded its own precedent, as well as its General Counsel's guidelines. Recently, the Board has recognized (in decisions issued around the same time as *Polymer*) that bargaining orders issued after a long delay at the Board level will not be enforced by a reviewing court, especially in cases where the passage of time is coupled with a change in current conditions. The same reasoning should apply here. A fair election is now possible at Polymer because any negative effects of the alleged unfair labor practices have long since dissipated. Therefore, the Court should grant certiorari to provide guidance to the Board and Courts on motions to reopen, and to determine the appropriate situations for courts to remand cases to the Board so that evidence of passage of time and changed circumstances may be considered.

C. *The National Labor Relations Board's Decision to Deny Polymer's Motion to Reopen was Erroneous*

The Board denied Polymer's Motion to Reopen as untimely. Polymer filed its Motion to Reopen a month after the Board issued its decision, three days beyond the 28 day guideline specified in 29 C.F.R. § 102.48 (2000). Polymer's delay in filing the Motion to Reopen was partially caused by the fact that Polymer did not receive a copy of the Board's decision and order until August 30, 1999, although the Board

rendered its decision and order on August 24, 1999. App. at 193a. Although the Motion to Reopen was timely filed according to the Federal Rules of Civil Procedure (as well at the Board's former rules), the Board's current rules calculate the 28 day guideline from the date the Board issues its decision.[8] *See* FED. R. CIV. P. 6(e); *Kessler Inst. for Rehab. v. NLRB,* 669 F.2d 138, 139-40 (3d Cir. 1982) (illustrating the Board's earlier adherence to the "three day" rule, which adds three days to a filing period when items are served by mail).

In addition, according to the language clearly stated in Section 102.48, the Board has the discretion to consider motions filed beyond the 28 days. Specifically, Section 102.48 states that the motion to reopen should be filed within 28 days, "or such further period as the Board may allow." 29 C.F.R. § 102.48. Despite this discretionary language, and the Board's own delays in issuing the decision in this case, the Board strictly enforced Section 102.48 against Polymer, and declined to grant the Motion. The Board denied the Motion as untimely, despite the fact that the Board deliberated for four years. In addition, Section 102.111(c) of the Board's Rules and Regulations permits late-filed documents in unfair labor practices cases. 29 C.F.R. § 102.111(c) (2000). The

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[8] Specifically, Rule 6(e) of the Federal Rules of Civil Procedure explicitly requires that an additional three days be added to a filing period when items are served on a party by mail. The wisdom and equity of this "three day" rule is clearly exhibited by the facts of this case. Even as calculated from the date of the Board's decision, rather than the date Polymer received notice of that decision, the "three day" rule would establish that the Motion to Reopen was timely filed within the 28-day period. The "three day" rule prevents precisely this kind of unfair prejudice from occurring.

Board decides whether to accept cases under this section by determining whether any prejudice would result and whether the neglectful conduct was excusable. *See, e.g., International Longshoreman's Assoc. and Coastal Cargo Co., Inc.*, 323 NLRB 570, 573 n.1 (1997) (granting motion under Section 102.111(c) based on employer's showing "that its noncompliance was inadvertent" and no prejudice would result from one day delay in filing). The Board's denial seems especially harsh considering the Board was aware, as Member (now Chairman) Hurtgen observed, that Polymer was in the process of transferring the case from the retiring attorney who previously handled the matter to Polymer's present attorney. App. at 14a-15a. For a new attorney to become acquainted with the facts of the case in the middle of a proceeding is challenging, and the Board's refusal to consider the Motion because of a three day delay is particularly unfair. However, even after denying the Motion because it was three days late, the Board waited five months before applying to the Fifth Circuit for enforcement of the bargaining order. In light of the Board's delay, it is unseemly for the Board to have denied Polymer's Motion to Reopen because of the Board's interpretation of barely missed time limits. It was within the Board's discretion to consider the new evidence to ensure that it provided Polymer employees with the appropriate remedy. The Fifth Circuit also had the authority to remand the case to the Board for consideration of new evidence, as it has in the past. *Texas Petrochemicals Corp.*, 923 F.2d at 401. Therefore, this Court should grant certiorari to provide guidance regarding when the Board should grant Motions to Reopen, even when those motions are untimely, so that the evidence and effects of the passage of time may be considered.

III. A *Gissel* Bargaining Order Should Not be Enforced in Favor of a New and Different Union

A *Gissel* bargaining order should not be issued for a union that is separate and distinct from the union selected by the employees; a point not adequately considered by the Board and totally ignored by the Fifth Circuit. In *Gissel*, the Supreme Court recognized that an employer may, under limited circumstances, be ordered to bargain with a union where the union proves majority status through possession of cards signed by a majority of the employees, authorizing the union to represent them. *See Gissel,* 395 U.S. at 597. However, the Polymer employees did not sign cards authorizing UNITE to bargain on their behalf. The Polymer employees signed cards indicating they wished the ILGWU to be their bargaining representative. Some six months after the Polymer employees signed the ILGWU authorization cards, the ILGWU ceased to exist because it was replaced by UNITE. The Polymer employees only knew about the ILGWU, and it was the only union listed on the Polymer employees' authorization cards. Once the ILGWU disappeared, the Polymer employees that were ILGWU signatories were to be moved to the newly formed UNITE, without being provided any notice or having the opportunity to vote. In fact, there is no evidence or findings to indicate that the Polymer employees were even aware that they were being moved to UNITE. Moreover, there is no evidence to support any assertion that the Polymer employees would want to be part of UNITE. Research has not revealed any case where a *Gissel* bargaining order was granted on behalf of a totally different union from the one named on the authorization cards bearing the employee signatures. By enforcing a bargaining order on behalf of a new and different

union, the Fifth Circuit has exceeded the scope of the *Gissel* decision.

Moreover, enforcing a bargaining order on behalf of a union that was not selected by the employees risks thwarting the preferences of current Polymer employees. *See Montgomery Ward & Co.*, 904 F.2d at 1161. This risk is increased by the fact that approximately seven years have passed since the Polymer employees first signed the ILGWU authorization cards. The *Montgomery Ward* decision stated:

> the people who work at the Pharr store in 1990 might want Local 455 of the Food Workers Union to represent them, we don't know this. They might want some other union, or no union. Local 455 might not want them (a possibility suggested by its failure to intervene in support of the Board's order or file an amicus brief). A bargaining order today based on events a decade ago may defeat all contemporary interests.

See id.[9] To protect these contemporary interests, the Board should issue bargaining orders only in extraordinary circumstances: "a bargaining order is not a snake-oil cure for whatever ails the workplace; it is an 'extreme remedy,' that must be applied with commensurate care." *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39 (D.C. Cir. 1991). Therefore, the Fifth Circuit erred in enforcing the bargaining order in

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[9] During the course of the *Polymer* proceedings, UNITE has not intervened in support of the Board's order or filed an amicus brief with the Fifth Circuit seeking enforcement of the order.

favor of UNITE, because such enforcement fails to consider the preferences of the current Polymer employees. This Court should grant certiorari to correct this error and to establish clear precedent on this issue.

IV. The Questions Presented are Important

In the recent *Overnite* decision, Judge Paul V. Niemeyer wrote for the majority: "by declining to follow our long-standing precedents for the application of *Gissel*, the Board improperly bypassed the employees' will on the question of representation, frustrating the fundamental policy of employee democracy established by Congress in the labor laws." *See Overnite Transp. Co.*, 2002 U.S. App. LEXIS 2214 at *5. The Fifth Circuit's decision in *Polymer* disregards this fundamental policy of employee democracy, overlooking a lengthy passage of time at the Board and a significant change in circumstances. In doing so, the Fifth Circuit has defeated the contemporary interests at Polymer. Charges of unfair labor practices continue to languish before the Board, and the Board lacks a clear standard regarding whether the passage of time and the changes that occur at the workplace during this amount of time are a sufficient grounds to decline the issuance of a bargaining order. The Circuit courts also lack a clear standard for these issues. The majority of Circuit courts have held that the passage of time and a change in current workplace conditions are significant grounds for denying enforcement of or overturning a bargaining order, and should be considered regardless of when evidence of these factors is presented. These courts, including the Fifth Circuit, have held that current conditions are directly relevant and must be taken into account when deciding whether to issue a bargaining order. The Fifth Circuit's decision in *Polymer* contradicts the majority of Circuit courts and further confuses the issue by failing to consider the passage of time and

changed circumstances. So long as this standard remains confused, the Board will continue to issue *Gissel* bargaining orders inconsistently, which after further delay, will be denied by most Circuit courts. A decision by this Court would relieve the burden on the Board and the Circuit courts that continue to grapple with this issue. Most importantly, issuing a bargaining order years after the employees select the union risks trampling on the employees' rights to select an appropriate bargaining representative. This risk is only exacerbated by the fact that, as in *Polymer,* employees at a company may be represented by a union new and different from the one they actually selected as their bargaining representative. Elections are the preferred method for determining a bargaining representative. After seven years, a fair election could be held at Polymer. The extraordinary remedy of a *Gissel* bargaining order should be reserved for cases where an election is not possible.

CONCLUSION

The petition for a writ of certiorari should be granted because: (1) the Board and Fifth Circuit's refusal to consider the passage of time and other evidence of changed circumstances raises important issues in the context of *Gissel* bargaining orders, and the Circuit courts are divided on this issue; (2) evidence of passage of time and changed conditions is important, and the Board needs guidance regarding the appropriate time to consider such evidence; and (3) the Board's issuance of a *Gissel* bargaining order in favor of a new and distinct union other than the one selected by employees raises an important issue regarding the scope and purpose of the Board's remedial authority.

Respectfully submitted,

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U.S.A. POLYMER CORP.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-60173

[Dated January 8, 2002]

NATIONAL LABOR RELATIONS BOARD Petitioner	)
v.	)
USA POLYMER CORP Respondent	)

Petition for Review of an Order of the National Labor Relations Board

ON PETITION FOR REHEARING

BEFORE GARWOOD, PARKER, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60173

[Filed November 6, 2001]

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

USA POLYMER CORP,
Respondent.

On Appeal From
National Labor Relations Board
Cases 16-CA-17189 and 16-CA-17455
August 24, 1999

JUDGES:
Before GARWOOD, PARKER, and DENNIS,
Circuit Judges.

Petition for Enforcement of the Order of the National Labor Relations Board

GARWOOD, Circuit Judge:

Acting on charges filed by the International Ladies Garment Workers' Union (ILGWU), the General Counsel of the National Labor Relations Board (the NLRB or the Board) issued a complaint against U.S.A. Polymer Corp. (Polymer) on March 21, 1995. The complaint alleged violations of 29 U.S.C. §158(a)(1) and (3), and eventually was consolidated with a subsequent complaint alleging violations of section 158(a)(4), (3), and (1). An administrative law judge (ALJ) issued a decision on March 25, 1996, finding merit in most of the allegations. Polymer filed timely exceptions. The NLRB issued a decision affirming the ALJ's conclusions on August 24, 1999. Polymer filed a motion for reconsideration, to reopen the record, and for rehearing dated September 24, 1999, which was received by NLRB on September 29. On October 5, the Associate Executive Secretary of the NLRB denied the motion as untimely. On October 8, Polymer filed a supplemental motion for reconsideration, reopening, and rehearing, which the Board denied on November 23. In March 2000 the Board filed with this court its application for enforcement of its August 24, 1999 order. 29 U.S.C. §160(e).

Facts and Proceedings Below

Polymer operates a plastics recycling facility in Houston, Texas. Its business is to recycle used plastic containers into plastic pellets that are then sold as raw material to manufacturers. Polymer employed sixty-four

people at its inception, and reached a peak workforce of ninety-two in February 1994. At the time of the events that were the subject of the instant complaint, Polymer employed sixty-eight non-supervisory employees, but since then the work force has dwindled to thirty-six.

In the fall of 1994, some of Polymer's employees contacted the ILGWU. In early October, the ILGWU began a campaign to unionize Polymer's workers. In January 1995, Polymer laid off twenty-nine employees, and then another ten in July. Since 1995, the workforce of Polymer has remained at around thirty-five employees.

The ILGWU filed a charge with the NLRB, alleging various unfair labor practices, including charges that the layoffs were motivated by a desire to quash the unionization campaign. The General Counsel of the NLRB issued a complaint against Polymer on March 21, 1995. The complaint was heard before an ALJ from June 5, 1995 through June 21, 1995, followed by a second two-day hearing in October. The ALJ issued his decision on March 25, 1996, and found that Polymer had committed numerous violations of the NRLA. The ALJ recommended the imposition of a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969). Polymer timely appealed the ALJ's decision to the Board.

For some unexplained reason, the NLRB did not issue its decision and order until August 24, 1999, more than three years after the ALJ's decision. The Board affirmed the ALJ's findings that, *inter alia*, "[Polymer] unlawfully threatened employees with more onerous working conditions, physical harm, layoff, discharge and other unspecified reprisals for

engaging in union and protected concerted activity." The Board also affirmed the ALJ's findings that Polymer made good on its threats by means of the January and July 1995 layoffs. *Id.* The ALJ found, and the Board affirmed, that Polymer had violated several sections of the National Labor Relations Act (NLRA). *See* 29 U.S.C. §158(a)(1), (3), and (4). The Board agreed with the ALJ that the severity of Polymer's conduct required the imposition of a bargaining order under *Gissel*. Under the bargaining order, Polymer was directed to bargain with ILGWU's successor union, the United Needle Trades, Industrial and Textile Employees (UNITE).

When the Board's order issued, Polymer's original counsel on this matter had retired, and Polymer was apparently in the process of finding replacement counsel. Polymer's new counsel filed a Motion for Reconsideration and to Reopen the Record with the Board. The motion is dated September 24, 1999, and was received by the Board on September 29, 1999. In that motion, Polymer argued that circumstances had changed since the ALJ's decision, including the restructuring of its business, a high turnover rate (only five employees who were working at the time of the complaint still worked for Polymer), and the passage of four and one half years. Polymer asked for reconsideration of the bargaining order in light of these changed conditions. On October 5, 1999, Polymer received a letter from the NLRB informing Polymer that the motion for rehearing was untimely. That same day, Polymer filed a motion contesting the untimeliness of its original motion. On November 23, 1999, the Board ordered that Polymer's motion for reconsideration would not be considered, and that the order would stand. The Board filed its application for enforcement

of its August 24, 1999 order with this court in March 2000. Polymer now contests the enforcement of the order.

Discussion

The Federal Circuit Courts are almost unanimous in holding that the NLRB must take current conditions into account when it determines whether to issue a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969).[1] *See, e.g., Charlotte Amphitheater Corp. v. NLRB*, 317 U.S. App. D.C. 270, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (noting that all Circuits except the Ninth require the NLRB to consider changed circumstances when issuing *Gissel* bargaining orders); *NLRB v. Cell Agriculture Manuf. Co.*, 41 F.3d 389, 398-99 (8th Cir. 1994). Relevant changed circumstances include passage

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[1] Of course, the order may still be appropriate despite the changed conditions, as illustrated by *Chromalloy v. NLRB*, 620 F.2d 1120 (5th Cir. 1980). *See also Bandag, Inc. v. NLRB*, 583 F.2d 765 (5th Cir. 1978). The NLRB relies on *Chromalloy* for the proposition that a *Gissel* case should *never* be remanded to the Board for reconsideration in light of changed circumstances. This is an incorrect oversimplification. We held in *Chromalloy* that while the existence of subsequent events is relevant, the Board may still decide that a bargaining order is required, and that the Board need not determine that the actual sentiment of the majority of the work force favors the union before issuing a bargaining order. *Chromalloy*, 620 F.2d at 1131-32. In *Chromalloy*, we held that the Board was not required in all cases to reopen the record for consideration of events occurring between the ALJ's decision and the Board's order. However, the Board's decision in *Chromalloy* was issued five months after the ALJ's decision; there was no issue of lengthy delay as in the instant case. *Id.* at 1123, 1132.

of time and turnover in the workforce. *Charlotte*, 82 F.3d at 1078. The Board should at least consider significant turnover and passage of time when determining whether a bargaining order was appropriate.[2]

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[2] Apparently this lesson has been a difficult one to learn for the NLRB. The D.C. Circuit recently expressed some frustration with the Board's repeated refusals to consider current circumstances when issuing bargaining orders:

> We have repeatedly called the Board to task for its intransigent refusal to accept and act upon our instructions that the appropriateness of a bargaining order must be assessed as of the time it is issued. Nor have we been alone.
>
> Given the changes in its own membership, it may well be that the Board is devoid of an institutional memory; but this court is not. Perhaps it believes it can wear us down; after more than twenty years, it should have learned that it cannot. As a consequence of its stubborn refusal to accept the holdings of virtually every circuit that has considered the matter, it has squandered a vast amount of our time as well as its own and has caused delays in the ultimate resolution of cases that cannot be laid at the feet of recalcitrant employers. If the Board continues to disagree with us, it is of course free to seek Supreme Court review.

Charlotte, 82 F.3d at 1079 (citations omitted).

However, despite the weight of the law in other Circuits, the law on this point in the Fifth Circuit is somewhat confused. In *NLRB v. American Cable*, 427 F.2d 446 (5th Cir. 1970), this court held that the Board must consider the current circumstances when determining whether to issue a bargaining order. *Id.* at 448-49. While *American Cable* was never overruled, in a subsequent opinion we stated that "in a case not involving a remand to the Board," the Court should evaluate the appropriateness of the bargaining order "as of the date of the unfair labor practice proceedings, not as of the date when the matter comes before the court." *See NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 497 n.7 (5th Cir. 1980). This line of cases is based on *J.P. Stevens & Co. v. NLRB,* 441 F.2d 514, 525 n.16 (5th Cir. 1971), which did *not*, in fact, hold that the time for consideration of current conditions was the time of the unfair labor practice proceedings. Instead, in *J.P. Stevens* we held that the proper time for evaluation of "current circumstances" was the time at which *the Board* issued its bargaining order. *Id.* This holding was read in *NLRB v. Gibson Prod. Co.*, 494 F.2d 762, 766 n.4 (5th Cir. 1974) to mean that this Court should not remand to update the record to take into account events subsequent to the *Board*'s (not the ALJ's) action. *Id.* We went one step further in *Dadco*, and held that in a case not involving a remand to the Board, the Court should evaluate the appropriateness of the bargaining order as of the date of the unfair labor practice proceedings, not as of the date when the matter came before the *Court*. *Dadco*, 632 F.2d at 497 n. 7. Despite our admittedly confusing line of cases, *American Cable* has never been overruled, and, in fact, now represents the overwhelming majority position among the Circuits on this issue.

Under *American Cable* the Board must consider evidence of changed circumstances when it evaluates the appropriateness of a *Gissel* bargaining order. If the Board had before it evidence that circumstances at Polymer's plant were in relevant respects significantly different from those at the time of the ALJ's decision recommending a bargaining order the Board erred when it refused to take the changes into account in determining whether a bargaining order should issue. *We* should not, however, take into account changes in circumstance that have occurred *since* the time of *the Board's decision*.

The Board's procedural rules permit an employer to submit a motion to reopen the record after the ALJ's decision but before the Board has ruled. After the filing of timely exceptions and briefs, the Board "may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may make other disposition of the case." 29 C.F.R. §102.48(b). Section 102.48(b) grants the NLRB wide discretion in the manner in which it deals with appeals from decisions of the ALJ and permits the Board to entertain motions to reopen the record in order to receive evidence of changed circumstances. At oral argument, both Polymer and the NLRB agreed that the Board's procedural rules would have permitted Polymer to file a motion to reopen or update the record prior to the Board's decision.[3] Although there is no clear procedural

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[3] Employers in other cases have moved to reopen the record in the time between the ALJ's order and the decision of the Board. *See, e.g., Texas Petrochemicals Corp. v. NLRB*, 923 F.2d

vehicle for such a motion, we agree with the parties' interpretation of the Board's regulations. Polymer could have submitted a motion to update the record at any time before the Board's decision, but made no such motion until a month after that decision.

The NLRB denied Polymer's motion for reconsideration and reopening because, according to its order, it had no discretion to allow filings after the twenty-eight day time limit imposed by 29 C.F.R. §102.48. Polymer argues that the NLRB had discretion under 29 C.F.R. §102.48(d)(2) to consider the late motion.[4] The Board now takes the

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398, 401 (5th Cir. 1991).

[4] §102.48(d) reads in pertinent part:

(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have

position, as it stated in its order, that the provision allowing late filings refers only to the Board's ability to allow for extensions of time when requests for such extensions are timely filed.

In *Camvac v. NLRB*, 877 F.2d 62 (6th Cir. 1989) (unpublished), the Sixth Circuit faced a case with an almost identical procedural history. As in the present case, in *Camvac* there was a long delay between the ALJ's original order and the Board's decision, and *Camvac* filed its motion for reconsideration three weeks after the twenty-eight day period allowed by section 102.48. The Sixth Circuit held that section 102.48 specifically allowed the Board to accept motions beyond the twenty-eight day period, and that the Board's failure to accept the "untimely" motion was an abuse of discretion.

> been taken at the hearing will be taken at any further hearing.
>
> (2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Copies of any
>
> request for an extension of time shall be served promptly on the other parties.

29 C.F.R. §102.48(d).

Although *Camvac* was an unpublished opinion, we agree with the Sixth Circuit that section 102.48 grants the NLRB discretion to entertain motions for rehearing after the twenty-eight day period has expired. The NLRB argues that section 102.48 simply allows the Board to extend the time for filing motions upon receipt of a timely motion for an extension. However, this argument is undercut by the fact that section 102.48 specifically provides that evidence that has become available "since the close of the hearing" can be accepted if it is filed promptly upon discovery. 29 C.F.R. §102.48(d)(1). Still, section 102.48 certainly does not command the Board to accept late filings-the treatment of those filings is within the discretion of the Board.

Polymer also argues that the Board had discretion to accept its filing under 29 C.F.R. §102.111(c). After initially stating that it had no discretion, the Board (in its order denying the motions for reconsideration) thereafter goes on to hold that section 102.111(c) governs acceptance of late filings, and that section 102.111(c) allows the Board to consider late filings "upon good cause shown based on excusable neglect and when no undue prejudice would result" and makes specific provision for acceptance of late filings. 29 C.F.R. §102.111(c). The Board found that Polymer's having to hire a new lawyer in the time between the order and the due date did not constitute excusable neglect and that therefore the requests for rehearing and reopening were denied. Although the amount of discretion that the Board has to accept late filings is somewhat unclear, it is clear that the Board does possess at least some discretion under both section

102.48(d)[5] and section 102.111(c). The Board's action in finding lack of good cause based on excusable neglect is reviewed for abuse of discretion. *See, e.g., Hospital Del Maestro v. N.L.R.B.*, 263 F.3d 173, 175 (1st Cir. 2001).

Under either provision we cannot say that the Board's decision to deny Polymer's untimely motion for reconsideration was an abuse of discretion, even thought the Board had taken an extraordinary amount of time to issue its merits decision in this case. It is not the Board's responsibility to continually update the factual picture that the parties have provided. While the Board must consider properly presented or tendered evidence of materially changed relevant circumstances in bargaining order cases, we can see no reason why the Board itself should be required to gather evidence. The party that seeks to benefit from demonstrating a change of circumstances bears the burden of timely providing the Board with evidence of those changes. The Board is entitled to assume, in the face of the parties' silence, that the facts as initially presented continue to adequately describe the employer's workforce.

The Board's delay does not excuse Polymer's failure to timely provide the evidence it seeks to introduce. Even though Polymer was in the process of hiring a new lawyer at the time of the Board's decision, this does not require the Board to excuse Polymer's failure to file even a request for an extension of time within the twenty-eight day period. And,

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[5] We see no reason that a party that files an untimely motion under §102.48(d) would not also have to demonstrate excusable neglect.

Polymer's acquisition of an attorney after the decision does not require the Board to excuse its failure to move to reopen the record prior to the Board's decision. There is no indication that any of the changes in circumstance that Polymer claims invalidate the bargaining order occurred immediately prior to the Board's decision. Instead, those changes are alleged to have occurred gradually, over a period of years. A party must be given a reasonable amount of time to file a motion to reopen the record after the events that change the party's circumstances. Had a sudden change in Polymer's business or workforce occurred only a few months before the Board's decision, perhaps their failure to update the Board before the decision would be excusable. However, there is no indication that this is the case. Polymer appears to have made a conscious decision to wait until after the Board's decision to inform the Board of the significant changes that had taken place in its workforce. The Board's refusal to accept Polymer's untimely motion was not an abuse of discretion.

Polymer also challenges the substance of the Board's decision approving the *Gissel* bargaining order. Polymer claims that the Board's decision is unsupported by the record. The Board should have evaluated the propriety of the *Gissel* order using the most current set of facts properly before it. Since Polymer's evidence of changed circumstances was not properly before the Board, the most current set of facts was the evidence presented to the ALJ. The NLRB's findings of fact, if not influenced by an erroneous view of the law, are conclusive if supported by substantial evidence on the record considered in its entirety. *Texas Petrochemicals v. NLRB,* 923 F.2d 398 (5th Cir. 1991). A reviewing court should not re-evaluate the credibility of witnesses, re-weigh the evidence,

or reject reasonable Board inferences simply because other inferences might also have reasonably been drawn. *NLRB v. Adco Electric, Inc.*, 6 F.3d 1110, 1115 (5th Cir. 1993).

The imposition of a bargaining order is an extraordinary remedy, which should be issued upon a determination "that the possibility of erasing the effects of past practices and of ensuring a fair election ... by the use of traditional remedies, though present, is slight and that employee sentiment ... would, on balance, be better protected by a bargaining order ...." *Gissel*, 89 S. Ct. at 1940. Upon review of the record in this case, we find that substantial evidence on the record as a whole supports the Board's conclusion that Polymer threatened and laid off a sizeable number of its workers due to union activity at its Houston plant. On the basis of the record properly before it, the Board did not abuse its discretion when it issued the bargaining order proposed by the ALJ.

Conclusion

The NLRB must consider current circumstances when issuing a *Gissel* bargaining order. But, the NLRB is entitled to treat the facts as of the ALJ's decision as static until the parties provide the NLRB with evidence that the relevant circumstances have materially changed, and Polymer has not timely presented or sought to present any such evidence. Because the NLRB did not abuse its discretion in refusing to accept Polymer's untimely motion, the NLRB's bargaining order should be evaluated on the basis of the facts in evidence before the ALJ. Since under those facts the Board did not abuse its discretion when it imposed the bargaining order, the order must be enforced.

The Board's application for enforcement is GRANTED.

APPENDIX C

NATIONAL LABOR RELATIONS BOARD

Cases 16-CA-17189 and 16-CA-17455

[Filed August 24, 1999]

U.S.A. Polymer Corp. and Texas-Oklahoma-Arkansas District Council--UNITE

DECISION AND ORDER

By John C. Truesdale, Chairman; Sarah M. Fox, Member; Peter J. Hurtgen, Member.

On March 25, 1996, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Charging Party filed a brief in support of the General Counsel's exceptions and a response in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm

the judge's rulings, findings,[1] and conclusions to the extent discussed below, and to adopt the recommended Order, as modified and set forth in full below.[2]

We agree with the judge's findings that the Respondent committed numerous, egregious violations of Section 8(a)(1), (3), and (4) of the Act and that a bargaining order should issue under the principles enunciated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).[3]

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB No. 14 (1997).

[3] In its brief in support of exceptions, the Respondent contends that there has been no determination of the appropriate bargaining unit. The judge did, in fact, make such findings in his decision at fn. 59, and in his conclusions of law, Item 3. The Respondent has neither filed exceptions to these findings nor disputed the judge's description of positions within the production and maintenance unit. Accordingly, we adopt the judge's finding concerning the unit appropriate for collective-bargaining within the meaning of Sec. 9(b) of the Act as set forth in item 3 of his conclusions of law.

The Board will issue a bargaining order, absent an election, in two categories of cases. *NLRB v. Gissel Packing Co.*, supra. The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive unfair labor practices which nonetheless have a tendency to undermine majority strength and impede election processes." In the latter category of cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and employee sentiments once expressed by authorization cards would, on balance, be better protected by a bargaining order." *NLRB v. Gissel Packing Co.*, supra at 613, 614-615; and *Cassis Management Corp.*, 323 NLRB 456, 459 (1997).

We find that the violations at issue in the instant case constitute category I conduct within the meaning of *Gissel*. The Respondent embarked on a series of pervasive and increasingly coercive unfair labor practices within weeks of

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Similarly, the Respondent has not filed exceptions to the judge's findings that the Union attained majority status in January 1995 or to his findings concerning the authentication of 47 authorization cards in the unit of 64 employees. The record shows that 41 cards were signed on or before January 21, 1995, and that the remaining 6 cards were signed on or before January 27, 1995. Accordingly, we adopt the judge's findings concerning majority status.

the advent of the employees' union activity. The first union contact with employees occurred in the latter part of September 1994, and the Union began its formal organizing campaign in the early part of October 1994. By January 27, 1995, the Union had attained majority status in the bargaining unit.

As more fully described in the judge's decision, the Respondent unlawfully interrogated employees about their union activity and the union activity of their fellow employees. The Respondent also unlawfully threatened employees with more onerous working conditions, physical harm, layoff, discharge and other unspecified reprisals for engaging in union and protected concerted activity. Employees were unlawfully subjected to surveillance and unlawfully promised a bonus or other rewards for not supporting the Union. The interrogations and threats were widespread, involving 7 different supervisors and at least 20 different employees.[4]

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[4] The Respondent's defense to these allegations rested primarily on its contention that it had no knowledge of the union activity. Although the Respondent filed exceptions to these violations of Sec. 8(a)(1) found by the judge, it did not address the individual incidents in its supporting brief. We adopt the judge's findings.

The Respondent also excepts to the finding that Carlos Hallatt is an agent of the Respondent. We note that Hallatt's conduct is at issue only in connection with his alleged interrogation of Lucio Aviles in January 1995. In view of the numerous instances of unlawful interrogations by other respondent officials, a finding

Furthermore, the Respondent made good on its threat of layoff or discharge by laying off 29 unit employees between January 27 and 30, 1995. These 29 employees represented 45 percent of the employees in the proposed bargaining unit and included 9 of 10 members of the employees' organizing committee.[5] To compound the impact of this unlawful conduct, the Respondent further violated the Act by issuing employees being laid off in January 1995 a letter requiring them to call on a daily basis, with failure to do so on 2 consecutive days "(causing) us to consider you unavailable for work or having resigned your position with our company." In addition, the Respondent's supervisors told remaining employees that those selected had been chosen because of their support for the Union in accord with the policy of John Bazbaz, the Respondent's president.

After the General Counsel issued a complaint concerning the conduct summarized above, the Respondent continued to violate the Act by penalizing employees who testified as witnesses for the General Counsel at the ensuing unfair labor practice hearing. Specifically, the judge found, and we agree, that the Respondent violated Section 8(a)(4) and (1) of the Act by interrogating witnesses for the General

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on this allegation would be cumulative and would not affect the remedy.

[5] In adopting the judge's finding that the layoff of these 29 employees violated Sec. 8(a)(3) and (1) of the Act, we find it unnecessary to rely on the statistical analyses presented by the Charging Party and apparently relied on by the judge.

Counsel after they had testified, asking other employees if they had received subpoenas to testify, and advising them that they could ignore the subpoenas. In addition, the Respondent suddenly disciplined employees who had been witnesses for talking among themselves, although there was no rule prohibiting that behavior. In this regard, one employee received an oral warning and two received written warnings. When one of the latter refused to sign the written warning because he believed he had done nothing wrong, Javier Guerrero, assistant to Bazbaz, fired him.[6] The Respondent also reduced employees' regular working hours and overtime after they had testified, while other employees who had not testified were allowed to keep their normal hours and overtime. Supervisor Israel Zepeda told another employee that he had been instructed by Bazbaz and Guerrero to make things hard on him for testifying against the Company.

In view of the foregoing, we find that the Respondent's intimidating course of conduct places it among those exceptional cases warranting a bargaining order under category I of the *Gissel* standard, because traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible. See *Cassis Management Corp.*, supra at 459. It cannot be gainsaid that the Respondent's discriminatory layoff of nearly one-half of the bargaining unit, coupled with contemporaneous statements that the reason for the layoffs was the employees' support for the Union and the extensive conduct violative of Section 8(a)(1) and (4) of the Act following the issuance of the first

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[6] Bazbaz subsequently rescinded the dismissal.

complaint, constitute unfair labor practices that are both outrageous and pervasive. The restorative effect that Board-ordered reinstatement may have on unit employees is severely diminished by this pattern of conduct. Accordingly, we find that a bargaining order is warranted under category I standards.[7]

Even if we were to find, however, that the violations were less than "outrageous." a bargaining order is warranted under category II standards. The Board has long held that threats of job loss are particularly coercive and likely to undermine the possibility of holding a fair election for an extended period. *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1141 (3d Cir. 1995). When such threats are made, employees receive an unforgettable message that any efforts they make to improve their working conditions could instead result in the loss of their livelihood. *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996). Here, where the employer proceeded to carry out its threats against so substantial a number of bargaining unit members, the message is not likely to be soon forgotten. As the Board commented in

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[7] Member Hurtgen finds it unnecessary to pass on whether a bargaining order is warranted under category I standards. He agrees with his colleagues that a bargaining order is warranted under category II standards. Member Hurtgen finds it unnecessary to pass on the impled (a)(1) violations found by the judge. In his view, these alleged violations are cumulative. Member Hurtgen finds it unnecessary to pass on the question whether employee Montes de Oca was a guard.

America's Best Quality Coatings Corp.,[8] discharge of employees because of union activity "goes to the very heart of the Act." The Respondent's outrageous conduct did not end with its massive unlawful layoff of union supporters, "the ultimate retaliation" for supporting a union.[9] Those employees who remained received a continuing message that those who were laid off had been "rewarded" for their union support. They also received the message that retribution for supporting the Union or testifying as witnesses for the General Counsel was the policy of the Respondent's highest official, John Bazbaz. In these circumstances, the possibility that employees would thereafter express their uncoerced desires through the mechanism of an election is slight, if it exists at all. Accordingly, under the circumstances here, it is clear that a bargaining order is not merely appropriate, but necessary.[10]

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[8] 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S. 1158 (1995).

[9] *Cassis Management Corp.*, 323 NLRB 456, 457 (1997).

[10] Chairman Truesdale and Member Fox reach this conclusion despite the passage of time of 4 years since the unfair labor practices occurred and 3 years since the judge's decision issued. As in *Garvey Marine, Inc.*, 328 NLRB No. 147, slip. op. pp. 6-7 (1999), they conclude that the passage of time does not diminish the need for and appropriateness of a bargaining order in this case.

Member Hurtgen does not agree with the Board's decision in *Garvey Marine, Inc.*, supra, slip op. at p. 9. However he notes that, in the instant case, the Respondent does not contend that the passage of time militates against the appropriateness of a bargaining order.

The Respondent has excepted to the judge's finding that it violated Sec. 8(a)(5) by refusing to recognize and bargain with the Union on the ground that there is no such allegation in the complaint as amended. In the particular circumstances of this case, we will delete the judge's finding since the General Counsel did not request this finding, and finding this violation will not affect the remedy here. As the Board explained in *Peaker Run Coal Co.*, 228 NLRB 93, 93-94 (1977), nothing in the Supreme Court's *Gissel* opinion makes a finding of Sec. 8(a)(5) a prerequisite for issuing a bargaining order if the Board has found that a union has attained majority status and that the respondent employer has committed violations of the Act, failing within either category I or category II as described in *Gissel*, which have undermined the union's majority status and "fatally impeded the holding of a fair election." As further explained in *Peaker Run*, in the absence of an 8(a)(5) allegation, the employer's obligation to recognize and bargain with the union commences on "the date on which the employer embarked on its unlawful antiunion campaign." Id. at 93. Accord: *Ellis Electric*, 315 NLRB 1187, 1188 (1994). In this case, the Respondent's obligation commenced on January 27, 1995, when the Union had attained majority status and the Respondent began its unlawful antiunion campaign with the discriminatory layoffs of unit employees.

In its exceptions, the Respondent contends that the merger of the Charging Party in Case 16-CA-17189, Texas-Oklahoma-Arkansas District Council. ILGWU, a/w International Ladies Garment Workers' Union, with the Amalgamated Clothing and Textile Workers to form the Union of Needle Trades, Industrial and Textile Employees (UNITE) precludes the issuance of a bargaining order because it raises a question of continuity of representation. As described more fully in the judge's decision, there was considerable

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 9 and renumber the following conclusion of law accordingly.

AMENDED REMEDY

Because of the serious nature of the Respondent's numerous violations of the Act and their impact on the entire unit, we require the Respondent to bargain with the Charging Party as the duly designated representative of the employees in the appropriate unit.

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testimony and documentation by the Charging Party to support its position that the post-merger entity, UNITE, provides for substantial continuity of representation under the four-part test set forth in *Western Commercial Transport*, 288 NLRB 214 (1988). The burden of proof is on the party seeking to prove discontinuity. *Insulfab Plastics*, 274 NLRB 817, 821 (1985), enf. 739 F.2d 961 (1st Cir. 1986). Here, the Respondent has not met that burden. Its reliance on *Pye v. Sullivan Brothers Printers, Inc.*, 38 F.3d 58 (1st Cir. 1994), is misplaced, because here, unlike there, the new entity will utilize the same leaders for contract administration and negotiation. Moreover, the same rules, dues and infrastructure are in place under UNITE as were present under the ILGWU. The Respondent relies primarily on the fact that the merger will result in an entity with a membership that is more than double the size of the ILGWU. That, however, is a natural result of a merger that may result in increased clout, but does not diminish the identity of the organization. *Insulfab*, supra at 823.

Because of its discriminatory discharge of the employees named in paragraph 5(a) of the judge's conclusions of law, the Respondent must offer those employees reinstatement to the bargaining unit positions they held and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[11]

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[11] As noted by the judge, the Respondent discriminatorily discharged Marco Posadas, but avoided any backpay liability by reinstating him before he suffered any backpay liability.

With regard to the alleged discriminatory layoff of 29 employees on January 27, the judge found that the layoffs of all those employees violated Sec. 8(a)(3) and (1). He also found, however, that "a layoff of some level would have occurred at some point well after January 1995 but *before* June 1995" (emphasis added). He recommended leaving to compliance the question of which employees would have been affected by such a subsequent layoff or layoffs. We agree and note that precedent dictates that in order to cut off the backpay of any given discriminatee or discriminatees, the Respondent must show that he or she would have been laid off in any event for a nondiscriminatory reason on the date for which a backpay cutoff is urged. See, e.g., *EDP Medical Computer Systems*, 302 NLRB 54, 55 (1991), enfd. mem. 959 F.2d 1101 (D.C. Cir. 1992) (respondent must show, as an affirmative defense, that discriminatee's job was eliminated for nondiscriminatory reasons after his unlawful discharge, in order to cut off backpay liability); *Pacemaker Driver Service*, 290 NLRB 405 (1988), affd. sub nom. *Bales v. NLRB*, 914 F.2d 92 (6th Cir. 1990) (employer which caused employee terminations when it closed a terminal in violation of Sec. 8(a)(3) carried its burden of showing that it would have closed the terminal for nondiscriminatory reasons on a particular date nearly 3 years later and that it would not have relocated the employees elsewhere;

The Respondent unlawfully retaliated against employees William Rosales, Camillo Ramirez, Jose Melendez, and Jesus Martines by denying them scheduled working and overtime hours. It must make them whole for their lost earnings in the manner set out above.

The Respondent must reinstate the position of electrician at its facility and offer Luis Aviles reinstatement to this position in addition to the backpay set forth above.

The Respondent must rescind the written warnings it gave William Rosales and Marco Posadas, remove any record of those warning from their personnel files, and inform them in writing that this has been done and that those warnings will not be used against them in any way.

Because of the serious nature of the Respondent's violations and because of the Respondent's egregious, widespread misconduct that demonstrates a general disregard for its employees' fundamental rights, we shall issue a broad order that requires the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

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backpay ends at that point).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, U.S.A. Polymer Corp., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Coercively interrogating employees about their union sympathies and activities and the sympathies and activities of fellow employees, and demeaning the Union in coercive conversation with employees.

(b) Threatening employees with more onerous working conditions, physical harm, layoff, discharge, and other unspecified reprisals for engaging in union or other protected concerted activities.

(c) Creating the impression of surveillance or subjecting employees to surveillance because of their union or other protected concerted activities.

(d) Promising employees a bonus or other reward for not supporting the Union or engaging in other union or protected concerted activities.

(e) Permanently laying off employees because they engaged in union or other protected concerted activities and to discourage them and other employees from supporting the Union or engaging in other protected concerted activity.

(f) Selecting employees for permanent layoff because they supported the Union or engaged in other protected concerted activity.

(g) Eliminating the job classification of electrician to avoid rehiring its discharged electrician because he supported the Union and engaged in union or other protected concerted activity.

(h) Verbally warning employees not to talk with other employees or threatening employees with unspecified reprisals because they gave testimony contrary to the interests of the Respondent in a Board hearing.

(i) Interrogating employees about their testimony given in a Board proceeding and advising employees to ignore Board issued subpoenas.

(j) Reducing the working hours of employees and withholding overtime work to employees because they gave testimony in a Board hearing and because they supported the Union or otherwise engaged in protected concerted activity.

(k) Imposing more onerous working conditions on employees in order to induce them to quit their employment because they gave testimony in a Board proceeding, supported the Union, and engaged in other protected concerted activity.

(l) Issuing written warnings to employees and discharging employees because they gave testimony in a Board proceeding and supported the Union or engaged in other protected concerted activity.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, including operators, helpers, forklift operators, packers, mechanics and electricians, and excluding all other employees, supervisors, and guards as defined in the Act.

(b) Within 14 days, offer the employees named below immediate and full reinstatement to their former bargaining unit jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

Miguel Alanis
Lucio Aviles
Hugo Benavides
Alejandro Blasic
Mario Aparicio
Julio Hector Garcia
Jose Giron
Oscar Godines

Rudolfo Bocanegro
Edgar Gerardo Carrera
Luis Castro
Nicholas Chajon
Elias Escobar
Miguel Angel Molina
Bethuel Montes De Oca
Felix Jovel Palacios
Manuel Perez
Mario Perez
Lionel Campoverde Verde
German Joya
Luis Martines
Nery Mendoza
Pedro Molgar
Miguel Molina
Mauro Moran
Walter Jose Orellana
Noe Ramirez
Nelson Rodriguez
Jose Rosales

(c) Make whole William Rosales, Camillo Ramirez, Jose Melendez, and Jesus Martines for the unlawful denial of their scheduled working hours and overtime hours in the manner specified in the amended remedy section of this decision.

(d) Within 14 days rescind the written warnings given to William Rosales and Marco Posadas and remove any record of such warnings from their personnel files. Within 3 days thereafter inform them in writing that this has been done and that such warnings will not be used against them in any way.

(e) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all payroll records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay under the terms of the Order.

(f) Within 14 days after service by the Region, post at its facility in Houston, Texas copies of the attached notice in

both English and Spanish, marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since November 1, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. August 24, 1999

John C. Truesdale, Chairman
Sarah M. Fox, Member
Peter J. Hurtgen, Member

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[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees about their union sympathies and activities and the union sympathies and activities of fellow employees, and demean the Union in coercive conversations with employees.

WE WILL NOT threaten employees with more onerous working conditions, physical harm, layoff, discharge, and other unspecified reprisals for engaging in union or other protected concerted activities.

WE WILL NOT create the impression of surveillance or subject employees to surveillance because of their union or other protected concerted activities.

WE WILL NOT promise employees a bonus or other reward for not supporting the Union or engaging in other union or protected concerted activities.

WE WILL NOT permanently lay off employees because they engaged in union or other protected concerted activities and to discourage them and other employees from supporting the Union or engaging in other concerted protected activity.

WE WILL NOT select employees for permanent layoff because they supported the Union or engaged in other protected concerted activity.

WE WILL NOT eliminate the job classification of electrician to avoid rehiring our discharged electrician because he supported the Union and engaged in union or other protected concerted activities.

WE WILL NOT verbally warn employees not to talk with other employees or threaten employees with unspecified reprisals because they gave testimony in a National Labor Relations Board hearing.

WE WILL NOT interrogate employees about their testimony given in a National Labor Relations Board proceeding and advise employees to ignore Board issued subpoenas.

WE WILL NOT reduce the working hours of employees and withhold overtime work to employees because they gave testimony in a National Labor Relations Board

hearing and because they supported the Union or otherwise engaged in protected concerted activity.

WE WILL NOT impose more onerous working conditions on employees in an attempt to induce them to quit their employment because they gave testimony in a National Labor Relations Board proceeding, supported the Union, and engaged in other protected concerted activity.

WE WILL NOT issue written warnings to employees and discharge employees because they gave testimony in a National Labor Relations Board proceeding and supported the Union or engaged in other protected concerted activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, including operators, helpers, forklift operators, packers, mechanics and electricians, and excluding all other employees, supervisors, and guards as defined in the Act.

WE WILL, within 14 days of the date of the Board's Order, offer the employees named below immediate and full reinstatement to their former bargaining unit jobs or, if those

jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

Miguel Alanis
Lucio Aviles
Hugo Benavides
Alejandro Blasic
Rudolfo Bocanegro
Edgar Gerardo Carrera
Luis Castro
Nicholas Chajon
Elias Escobar
Miguel Angel Molina
Bethuel Montes De Oca
Felix Jovel Palacios
Manuel Perez
Mario Perez
Lionel Campoverde Verde
Mario Aparicio
Julio Hector Garcia
Jose Giron
Oscar Godines
German Joya
Luis Martines
Nery Mendoza
Pedro Molgar
Miguel Molina
Mauro Moran
Walter Jose Orellana
Noe Ramirez
Nelson Rodrequez
Jose Rosales

WE WILL make whole William Rosales, Camilio Ramirez, Jose Melendez, and Jesus Martines for the unlawful denial of their scheduled working hours and/or overtime hours, with interest.

WE WILL, within 14 days from the date of the Board's Order, rescind the written warnings given to William Rosales and Marco Posadas, remove such warnings from their personnel files and WE WILL, within 3 days thereafter, inform them in writing that this has been done and that such warnings will not be used against them in any way.

U.S.A. POLYMER CORP.
ALJ: WALLACE H. NATIONS

ALJ-DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge.

This case[1] was tried in Houston Texas on June 5 - 21, 1995 and October 17 and 18, 1995.[2] Based upon charges filed by the predecessor of Texas-Oklahoma-Arkansas District Council - UNITE (hereinafter Union), Complaint and Notice of Hearing issued on March 21, 1995 and an Amended Complaint issued on May 5, 1995. The Complaints allege that USA Polymer Corp. (hereinafter Respondent or Company) engaged in conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (hereinafter Act). Subsequent to the closing of the record in Case 16-CA-17189 on June 21, 1995, additional charges were filed by the Union

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[1] The Charging Party in Case 16-CA-17189 was Texas-Oklahoma-Arkansas District Council, ILGWU, a/w International Ladies' Garment Workers' Union. On July 1, 1995, this Union merged with the Amalgamated Clothing and Textile Workers Union to form a new union known an Union of Needle Trades, Industrial and Textile Employees (UNITE).

[2] All dates in the months of September, October, November and December are in 1994 unless otherwise noted. All dates in the months of January, February, March, April, May, June, July, and August are in 1995 unless otherwise noted.

against Respondent and a Complaint issued in Case 16-CA-17455 alleging that Respondent has engaged in further conduct in violation of Section 8(a)(1) and (3) of the Act and additionally, has violated Section 8(a)(4) of the Act. General Counsel in these proceedings filed a Motion to Reopen the Record in Case 16-CA-17189 and Consolidate it with Case 16-CA-17455, alleging that the matters involved in the new case are intimately related to matters already litigated. There was no opposition to this Motion and it was granted. Hearing on the Consolidated Complaint was held October 17 and 18, 1995.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, engages in the recycling of plastic material for commercial sale at its office and place of business in Houston, Texas. It admits in its Answer to the Complaints and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Involved Labor Organization

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background and Issues for Determination

Respondent is a wholly owned subsidiary of Z. L. Star, a holding company which owns a number of other enterprises including a company called Polytex Fibers. In 1992, Respondent was created from a division of Polytex Fibers and became an independent company. The officers and supervisors of Respondent are: Isaac Bazbaz, President of Z. L. Star, John Bazbaz, President of Respondent, Javier Guerrero, Assistant to John Bazbaz, Luis Mendoza, Plant Manager, and Fernando Molina, Sergio Palacios, German Robles, Cesar Portillo, Israel Zepeda and Augustine Garcia, plant supervisors.[3] During most of the time frame, January 1994 through January 1995, it employed about 60-65 non-supervisory employees engaged in various aspects of recycling plastic materials. The Company recycles high-density polyethylene and polypropylene. In its polyethylene production, it recycles post-consumer polyethylene resin, which is derived from, inter alia, milk jugs and detergent bottles. The raw material for recycling is purchased in bales then washed, blended, ground and extruded or pelletized to make a finished product. The pelletized recycled plastic is then sold to other companies which use the product in the

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[3] The names of various persons involved in this proceeding are spelled differently in various parts of the transcript and in the pleadings and briefs. I have adopted one spelling for each person and have stuck with the spelling throughout this decision. If the spelling I have adopted is not the correct one, I apologize the person whose name is misspelled.

manufacture of new containers and other products. In its process the Respondent uses a number of machines, including washers, grinders and extruder/pelletizers. Its polypropylene process utilizes raw materials obtained from commercial sources and is not dependent upon consumer recycling. Employees who work on the washers, blenders, grinders and the extruder are called operators and helpers. The Company also employs forklift operators, and a lab technician. Prior to a layoff which occurred in late January it employed electricians and mechanics who performed most electrical and mechanical maintenance duties at the plant. Subsequent to the layoff these duties have been subcontracted. In the event a representation election were to be held, the unit would likely include the operators, helpers, forklift drivers electricians, and mechanics.

The Union's involvement with Respondent began in the last part of September, when a Houston man with connections with a number of unions, Andres Reyes Garza, received a call from an employee of Respondent, Luis Castro, who expressed interest among the employees of Respondent in having union representation. Garza passed the message on to the Union and was employed as an assistant organizer and was given clearance to continue talking to the employees. The Union embarked on a formal organizing campaign in the early part of October. The Union also assigned one of its full-time organizers, Ricardo Medrano, to work on organizing Respondent's employees. With the help of some interested employees, the organizers secured the names, addresses and phone numbers of the other employees. They began a study of Respondent's business, looking at its ownership, management, competition and customers. They also looked into the wage and benefit structure and at plant working

conditions. House calls on employees were conducted and meetings with employees held in October, November and December. Interest in representation was high and in January the Union established an employee organizing committee The ten members of this committee were Lucio Aviles, Alejandro Blasio, Rodolfo Bocanegra, Edgar Carrera, Luis Castro, Javier Garcia, Jose Giron, Guadalupe Leal, Luis Martines, Pedro Molgar, Nery Mendoza, Miguel Molina, Manuel Perez, Felix Palacios, Mario Perez, Miguel Lancan Perez, Marco Posadas, Jose A. Rosales and William Rosales.

On January 7, the Union sent to Respondent a letter by certified mail in which it noted the names of employees on the organizing committee. Copies of the letter were given to everyone on the committee and perhaps other employees. John Bazbaz testified that the Respondent did not receive this letter, testifying that it did not get the signature card which accompanies certified mail. I do not credit this testimony. Instead I find that it refused to accept the letter. The envelope in which the letter was sent shows that the Post Office made at least two attempts to deliver it. Company mail is received by Polytex Fibers, which sends it to USA Polymer. Bazbaz testified that Respondent was advised by counsel on or about February 3, 1995 not to accept certified mail from the Union to avoid a recognition request based on a card majority. I believe and find that assuming such counsel was given, it was given at the time of the first certified letter from the Union, whose name prominently is shown on the envelope. As will be discussed in connection with various of the alleged violations of the Act, Respondent had knowledge of the organizing campaign prior to January.

During the first three weeks of January, the Union secured signed authorization cards from about 58 or 59 of the 64 employees of Respondent who would be in the bargaining unit. Then, beginning January 27, the Respondent laid off about 29 of its employees. The General Counsel contends that the layoff was aimed at stifling the Union organizing effort and was the culmination of a number of threats and intimidating conversations the Respondent's supervisors had directed at employees during the campaign. Accordingly General Counsel argues alternatively that the layoff itself was unlawful, or if economic justification existed for the layoff, the selection of employees to be laid off was discriminatory and unlawful.[4] Respondent contends otherwise. It asserts that it had no knowledge of any organizing activity until after the layoff. Several witnesses characterized the campaign as a quiet one, but would not agree that it was a secret campaign. The employees did not wear union buttons or other union insignia during the campaign, having been told by organizer Garza that they would be fired by the Employer if they wore them. Respondent contends that the layoff was economically motivated. John Bazbaz testified that with the exception of two months in 1994, the Company has not been profitable during its existence. According to Bazbaz, Respondent had to undertake some action to cure the economic problem, and that

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[4] All of the employees laid off were employees who had signed Union authorization cards prior to the layoff. Only five non-supervisory employees did not sign authorization cards. These employees were Hugo Barrera, Manuel Medrano, Antonio Suarez, Abraham Tobar and Jose El Cid. All of these employees with the exception of El Cid are still employed by Respondent. These five employees were also unaffected in the July, 1995, layoff.

resulted in a layoff. According to the brothers Bazbaz, the decision to make the layoff was made in the first couple of weeks of January, 1995. Though the evidence regarding how the number of employees to be laid off was derived is somewhat conflicting, at least one formula suggested was that they decided to reduce the Company's operating time by 30 percent. At the time of the layoff, the Company had about 64 non supervisory employees It laid off 29 or about 45 percent of such employees.

After the layoff, some of the employees came to the Union office and informed the Union that they had been laid off. The Union then investigated to determine the reasons for the layoff and found that the remaining employees were fearful and would not talk to its representatives or return their phone calls. At least three Union meetings were held after the layoff and with the exception of a handful of current employees of Respondent, were primarily attended by laid off employees. The involved Union organizers were told by present employees that the layoff had instilled fear in their fellow workers. Since the layoff the Union has been unable to get any additional employees to sign cards. The organizers each testified that they had never before encountered a campaign where almost half of the workforce was laid off during an organizing campaign. Following the layoff, the Union filed charges with the Board which resulted in the issuance of the first Complaint.

The first Complaint alleges that at various times during the campaign, certain of Respondent's supervisors committed violations of Section 8(a)(1) and (3) of the Act, primarily in conversations with employees. Additionally, it alleges that the layoff of about half of the employees in January 1995 was

discriminatorily motivated and violated Section 8(a)(3) of the Act. Following the first hearing in this matter, held in June, 1995, a second Complaint was issued, the two Complaints were consolidated and the new allegations were litigated at a hearing held in October, 1995. The second Complaint alleges that following the first hearing herein, the Respondent committed certain Acts in violation of Section 8(a)(1), (3) and (4) of the Act, including threatening employees, reducing overtime to certain employees and laying off ten additional employees in July, 1995. Respondent denies all allegations that it committed the unfair labor practices alleged and asserts that the second layoff was the result of a decision to cease its polyethylene production for economic reasons. Respondent admitted the supervisory status of Issac Bazbaz, President of Z. L. Star, John Bazbaz, President of Respondent, Javier Guerrero, Assistant to John Bazbaz, Luis Mendoza, Plant Manager, and Fernando Molina, Sergio Palacios, German Robles, Israel Zepeda, Cesar Portillo and Augustine Garcia, plant supervisors. However it denies supervisory or agency status of a consultant named Carlos Hallatt and asserts that one of the alleged discriminatees, Lucio Aviles was a supervisor and not a rank and file employee. Respondent further contends that one employee, Montes De Oca, was a guard and not a production employee. These issues with respect to the status of Hallatt, Aviles and De Oca will be resolved below before making findings with respect to the alleged unfair labor practices.

B. The Supervisory Status of Lucio Aviles and Carlos Hallatt and that of Montes De Oca as a Guard.

1. Was Lucio Aviles a Supervisor?

Lucio Aviles was one of the first employees of Respondent, having been employed by it at its inception. Aviles had previously been employed by Polytex Fibers and transferred to Respondent when it was formed. He performed electrical maintenance and electrical installation work for Respondent and also performed similar work on occasion for his previous employer Polytex Fibers and other of the Z.L. Star companies. He was active in the campaign and was one of the employee organizing committee members. He was one of the employees laid off on January 27 and is alleged to be a discriminatee. Respondent takes the position that he was a supervisor with the Company because, according to John Bazbaz, Aviles directed other electrical employees' activities. Bazbaz also testified that Aviles also planned installations, including deciding what materials were needed and then having the people under him perform the work. Bazbaz was able however to remember only one employee by name that Aviles ever supervised, a Miguel Perez, and could remember no specific jobs that Aviles had purportedly supervised. Bazbaz also admitted that no one can order materials without either his approval or that of his brother Isaac Bazbaz.

Aviles testified that he was an employee and was supervised by Carlos Hallatt. Hallatt is employed, according to Bazbaz, as an independent consultant to help solve critical maintenance problems and also to build and modify equipment. Bazbaz also admitted that Hallatt advised Aviles on a daily basis about what needed to be done as it related to

electrical matters. Bazbaz testified that he advised Aviles of his supervisory status at the time he began working for Respondent, adding that he told Aviles that he was to supervise the people hired to work under him, to train these workers and direct them. He contends he gave Aviles the power to suggest that employees be fired and the authority to request that employees be hired and approve the hiring According to Bazbaz, Aviles could request of him that overtime be approved and could recommend wage increases for employees working under him. The record contains no concrete examples of any exercise of any of these alleged powers by Aviles.

Aviles considers Hallatt to be his supervisor because he instructed him on a daily basis concerning what was to be done that day. Additionally, John Bazbaz told him when Hallatt was hired that he was his supervisor. Bazbaz did not tell him that Hallatt was a consultant and not an employee of Respondent. Aviles denied that any one ever told him he was a supervisor. In this regard he related a conversation he had with John Bazbaz and Hallatt in November. Aviles had a meeting with the two and complained to them about a deduction from his pay. Bazbaz told him it was a punishment for failing to answer his beeper. Bazbaz agreed that the deduction would cease after the pay period. Aviles salary had been increased because he performed work for other Z. L. Star companies. Super Bag and Polytex Fibers. Hallatt then said that they wanted him to be a supervisor. Aviles said he did not want that position and refused to accept it. Hallatt then asked if he would be a lead man. Aviles said he did not want that either, he just wanted to continue doing his job. Bazbaz and Hallatt agreed to honor Aviles' wishes. Aviles denied he

had any of the indicia of a statutory supervisor. Support for this position can be found in the testimony of Luis Martines.

Luis Napoleon Martines was employed as an electrician by Respondent in August 1994 and worked with Aviles. He testified that his supervisor was Carlos Hallatt. He was not told that Aviles was a supervisor. Hallatt told him when he was hired that he would be an electrician and work for him. Not only did Aviles not supervise his work, he occasionally told Aviles how to perform some electrician's duties, telling Aviles what to do and how to do it.

Further support for finding Aviles not to be a supervisor can be found from two other sources. First, Respondent uses accounting codes for its various departments, assigning the 900 code series to supervisors Aviles was assigned a 700 code, the one for the maintenance department. Second, both Bazbaz and his assistant Javier Guerrero gave some rather unbelievable testimony regarding Aviles. Although Aviles was a long time employee and had been given two raises in the Fall of 1994, both Bazbaz and Guerrero called Aviles slow, undependable and incapable of performing electrical tasks that needed doing. This testimony came in defense of the decision to layoff Aviles and thereafter permanently eliminate the position of electrician at the Company. Respondent now contracts for electrical work that Guerrero cannot perform himself. This wholly unnecessary and unbelievable attack on Aviles competency belies much of their testimony about him and his position with the Company. Guerrero also testified in another context that no supervisor was laid off in the January layoff. This testimony also belies Respondent's position that Aviles was a supervisor.

Based on the credible evidence adduced and specifically crediting the testimony of Aviles over that of Guerrero and Bazbaz, I find that Aviles was simply an electrician and not a supervisor. As noted above, there is no evidence to support supervisory status except for the testimony of Bazbaz and Guerrero to the effect that Aviles was a supervisor and there is clear evidence that he was not. I do not credit the testimony that he possessed supervisory powers as no example of the exercise of such power was given and the evidence supplied by Luis Martines refutes such a contention. I also credit Aviles testimony about his conversation in November with Bazbaz and Hallatt that clearly shows that he was not a supervisor.

2. Was Carlos Hallatt a Supervisor or Agent?

Carlos Hallatt has been employed for eighteen years as a consultant by Instalaciones Anahuac, of Mexico City and is assigned by that company to provide service to Respondent pursuant to a consulting agreement. This assignment began about January 1994 and continues to date. Respondent pays $ 2000 per week, plus about $ 2000 a month in expenses for Hallatt's services. Hallatt calls himself an industrial technician and gives advice and direction for layouts and maintenance of the entire recycling system operated by Respondent. He has known the Bazbaz family for about 20 years and has previously done consulting work for them at companies they have owned in Mexico.

Hallatt did not deny the assertions made by Aviles and Martines that they were told that he was their supervisor and that he supervised their activity. Thus he does possess one of the criteria for determining supervisory status, that of

independently directing the work of other employees. The only reason that this matter is an issue is whether a conversation Hallatt had with Aviles on January 27 can be attributed to the Respondent. Because Hallatt was introduced to Aviles as his supervisor, I believe that Respondent cloaked him with authority to speak on behalf of management and thus, I find that Hallatt is at least an agent of Respondent within the meaning of the Act.

3. Was Montes de Oca a Guard?

Bethuel Montes de Oca Mendoza worked for three years for Respondent until he was laid off in January. He testified that in the last part of 1994 and the first part of 1995, he worked on conveyors, feeding raw material into the grinders. An affidavit given to the Board by the witness states: "I would say as of September 1994, I worked guarding the door and checking on the parking lot and taking care of the dogs only." When asked repeatedly what he did after September 1994, Montes de Oca could not remember. He did not carry the employee code carried by most of the other employees who worked in the recycling process. The only other employee I could find who had the same code as Montes de Oca and who testified was a packer. In support of Respondent's position on this matter is the fact that after Montes de Oca was laid off, it employed a independent security agency to provide a guard.

I find that the evidence adduced with respect to the status of Montes de Oca is inconclusive on the issue of whether he is a guard. Clearly he was a production employee for several years. Thus for the purposes of this decision, I find that he was a production employee who apparently

performed some functions that might be classified as those of a guard. I find that he should be treated the same as the other production employees laid off by Respondent.

C. The Alleged Unfair Labor Practices Committed by Supervisors Prior to the January 27 Layoff.

As noted earlier, the Complaint alleges that a number of Respondent's admitted supervisors engaged in conversations with employees prior to the January 27 layoff in which the employees were interrogated about their union activity, the union activity of fellow employees and were threatened with a variety of reprisals for engaging in such protected activity. The allegations, if established, also demonstrate Respondent's knowledge of the organizing campaign almost from its inception. Specifically the Complaint alleges that Respondent violated the Act by:

> 7. Supervisor Augustine Garcia:[5]
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> (a) In mid-December, interrogating employees concerning their union activities.
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> (b) About January 25, interrogating employees concerning their union activities.
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> (c) About January 27, telling employees that they had been laid off because of their union activities.

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[5] The paragraph numbers used in this section relate to the paragraph numbers in the Complaint.

(d) About January 27, telling employees that fellow employees were laid off because of their union activities.

(e) In early January: interrogating employees concerning the union activities of fellow employees

(f) In early December: interrogating employees concerning the union activity of fellow employees

(g) In early December, threatening employees with discharge if they supported the Union.

8. Supervisor Javier Guerrero.

(a) In late November, questioning employees as to whether they were going to continue to pass out union material.

(b) About January 27, told employees that the time they were on layoff status would give them the opportunity to consider their involvement with the Union.

(c) About February 2, told employees that their layoffs were because they were involved with the Union

(d) Supervisor Javier Guerrero, about July 7, telling employees that they had been selected for layoff because of their support for the Union.

9. Supervisor Fernando Molina:

(a) About December 15, and at various times thereafter, interrogating employees concerning their involvement with the Union.

(b) About December 15, threatening employees with discharge for engaging in activities on behalf of the Union.

10. Supervisor Sergio Palacios:

(a) About January 5, interrogated employees concerning the involvement of fellow employees in the Union.

(b) About January 27 advising employees that had they identified the Union supporters to him, they would not have been laid off.

(c) About January 24, denying an employee assistance because he was believed to be a union supporter.

11. Supervisor Herman Robles:

(a) In November, interrogating employees concerning their union activities.

(b) In November, threatening employees by stating that if they were involved with the Union, they would be fired.

12. Supervisor Caesar Portillo:

(a) About mid-December, threatening employees with more onerous working conditions if they would not tell Respondent who was active on behalf of the Union.

(b) In mid December, threatening employees with discharge if Respondent discovered who was supporting the Union.

(c) In mid-December; threatening employees with physical harm if Respondent discovered that they were distributing Union literature.

(d) About January 7, threatening employees with discharge if Respondent discovered that they were involved with the Union.

(e) About January 7, telling employees that if they did not like the way things were at Respondent they should look for another job.

(f) About January 7, interrogating employees as to their union activities.

(g) About January 13, interrogating employees concerning their union activities.

(h) About January 13, threatening employees that if they did not like how things were going at Respondent, they should quit.

(i) About January 20, threatening employees with discharge because their names had been sent in a Union letter to the Company.

(j) About January 20, threatening employees that if Respondent discovered that

they were active on behalf of the Union, they would be fired.

(k) About January 20 offering employees a bonus if they would disclose the identity of union adherents.

(l) About January 24, threatening employees with discharge if they continued their involvement with the Union.

(m) About January 24, creating the impression of surveillance by telling employees that Respondent knew that they had attended Union meetings.

(n) About January 23, interrogating employees concerning the union activity of fellow employees.

(o) About January 25, threatening employees with discharge if they supported the Union.

Hereinafter, the evidence adduced with respect to the alleged pre-layoff violations by supervisors will be discussed under subheadings for each involved supervisor. A number of conversations with or interrogations and threats by supervisors that are not specified in the Complaint were testified about by the employee witnesses. Those conversations or interrogations which occurred before the January 27 layoff will be considered on their merits as Respondent's defense to these is simply that no conversations about the Union between management and employees could have occurred before the layoff as Respondent denies any knowledge of the Union campaign until after the layoff. Under these circumstances, Respondent would not be denied due process as no investigation of these conversations is

necessary. On the other hand, with one exception, conversations which are not alleged to be unlawful in the Complaint occurring after January described by the employee witnesses will not be considered on the merits as Respondent was not given the opportunity to investigate the circumstances of these alleged conversations.

Supervisor Augustine Garcia

Supervisor Augustine Garcia, asked employee Guadalupe Leal if he was in the union movement while he was working in December. Lea said that he was. Garcia said that he was not interested in the union.[6]

Hugo Benavides, began working for Respondent in September 1994 as a grinding machine operator. About the middle of December 1994, supervisor Augustine Garcia spoke to him while he was working. Garcia asked him if he was in the Union. Benavides replied that he was in the process of getting in the Union.[7]

In the latter part of January, supervisor Garcia approached employee Nelson Chajon white he and Lucio Aviles were discussing the Union. Aviles left and Garcia asked him what they were saying about the Union. Chajon did

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[6] This testimony relates to Complaint allegation 7(a), above.

[7] This testimony relates to Complaint allegation 7(a), above.

not answer and Garcia asked why he did not want to tell him. Garcia left at this point.[8]

On January 25, supervisor Garcia asked forklift operator Manuel Perez at work, if he was attending Union meetings and Perez answered that he was not. Perez had attended such meetings, but feared he would be fired if he admitted it.[9]

On January 27, electrical employee Luis Martines had a conversation with supervisor Garcia. Garcia told him, "Do you realize what happens to the suckers -- all the stupid guys that are involved with the union? We kicked out the first sucker and you wait and see what is going to happen to the others." The witness responded, "We were going to get fired because we were fighting against injustice?" According to the witness, Garcia said, "We kicked out -- we fired that shit, Jose Rosales, and we are going to continue with all the others." Garcia told him to wait, that they were going to see what was going to happen to them.[10]

Martines also testified that in about November, he spoke with supervisor Garcia while working at his job. Garcia approached him and said, "Aww, you know, quit this cock-

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[8] This testimony relates to Complaint allegation 7(b), above.

[9] This testimony relates to Complaint allegation 7(b), above.

[10] This testimony relates to Complaint allegation 7(c) and (d), above.

sucking maneuver or act. Quit this nonsense - stupid things. John Bazbaz, Javier Guerrero already know that you are the leader of this movement." The witness added that Garcia also told him to stop his involvement with the Union, because Bazbaz fired employees who tried to get the Union in. Garcia added that he knew that Martines was the leader of the movement and that Lucio Aviles was the second in command. Garcia then asked who were the other Union supporters and when they were going on strike. The witness did not answer. Garcia then told him that the boss was not going to rest until he saw they were out of a job and that the employees were going to be sorry for organizing the Union.[11]

Employee Pedro Molgar testified that around January 30, he asked supervisor Garcia why the employees had been laid off. Garcia told him they were laid off because of the problem they were causing the Company, identifying the Union as the problem.[12]

Supervisor Javier Guerrero

On January 27, Guerrero told Castro and another employee, Hugo Benavides they were being laid off because

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[11] This testimony relates to Complaint allegations 7(a), and or 7(f) and (g), above.

[12] I believe the correct date for this conversation was January 27, the date of the layoff. Molgar was not laid off until January 30. It was pointed out that in his affidavit to the Board, Molgar did not say that Garcia identified the Union as the problem causing the layoff. This testimony relates to Complaint allegation 7(d) above.

of a lack of material. Castro told him that the real reason for the layoffs was the Union. Guerrero responded by saying it is the policy or politics of John Bazbaz. Guerrero suggested that it he wanted to talk further to call his lawyer. Castro asked why and Guerrero told him "Because you are going to need it." Guerrero then laughed at him. Castro said this was not a joke and Guerrero said, "Take it as you wish."

Later that day, Castro encountered Supervisor Portillo, who said, "It has happened." Castro asked, "What are you talking about?" Portillo answered, "You got fired." Castro said, "You already knew." Portillo responded, "Yes." Castro said, "Thank you for your good help."

At a later point on the 27th, Guerrero went to Castro at the densifier where Castro was speaking with some other employees. He was accompanied by a security guard. Guerrero threatened the employees, saying, "Quit talking about that union. See what happened to (Castro). This could happen to you, too. If you don't leave, I am going to kick you out." Castro left.[13]

Employee Montes de Oca related a conversation he had in early 1995 with supervisor Javier Guerrero. He was waiting to give another employee some authorization cards to distribute. Guerrero asked him. "What the fuck are you doing

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[13] This threat is not alleged in the Complaint, but is credited in any event for the reasons set forth later in this section.

with those cards?" Guerrero then told him that if he continued to distribute the cards, he would fire him.[14]

Lucio Aviles testified that around the beginning of January, 1995, while repairing an electrical problem with a fellow employee, Luis Martines, supervisor Javier Guerrero approached them angrily and put his hands on the panel that Aviles and Martines were working on Aviles told him to calm down. Guerrero raised his hands in an agitated way and told Aviles to "quit the cocksucking attitude, because that is what you are. And that is what you are doing with the union."

Electrical employee Martines also remembered this occasion. He testified that Guerrero approached them in an angry manner and asked, "What the fuck we were doing there?" They were performing electrical work on a panel. Guerrero tried to close and open the doors of the panel and Aviles told him to be careful because they had not finished repairing the panel. They had cut the electricity to the panel while they were repairing it. Guerrero said to "Quit all this shit. You (referring to Aviles) and those of the union will suck my prick. These are just cocksucking things." According to Martines, Guerrero was furious and he began to roll up the sleeves of his shirt and gestured at Aviles. The witness saw that Guerrero was angry and told Aviles to leave. He testified that Hallatt was observing this incident but did nothing.[15]

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[14] This testimony is related to Complaint allegation 8(a), above.

[15] This testimony was not alleged to be a violation of the Act in the Complaint. However, for the reasons set forth later in this section, I credit the testimony and find that Guerrero did

Luis Martines testified that on January 27, he was told to report to Guerrero.

Guerrero told him to sign a paper, but hid what the paper said. The witness said he could not sign without knowing what he was signing. According to Martines, Guerrero said, "I want to tell you the truth. This is a policy of John Bazbaz to fire all those from the union. This is why we are going to give lay-off to all of them."The witness asked why all the employees were being laid off when there was so much work to be done. Guerrero replied, "That is the boss' policy.[16]

Alejandro Blasio learned he was being laid off on January 27 when he arrived for work about 3:00 pm. A supervisor, Fernando Molina told him to punch his timecard and report to Javier Guerrero. When he did so he met with Guerrero in the company of almost all of the employees on his shift, including Edgar Carrera, Jose Giron, and Nery Mendoza. In all about eight to ten employees were at this meeting. The witness described the meeting thusly: "Javier Guerrero was behind his desk. Everybody else was around him. I arrived; I was one of the last ones. I went in. He gave me an envelope, and he told me, 'We are giving you layoff because of a lack of work.' Guerrero gave him a letter. I opened the envelope. And Javier Guerrero told me, 'Sign the copy, give it to me, and keep the original.' And I said, Why is this? He said, 'Because there is no work, and so we are

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threaten Aviles and Martinez in violation of the Act.

[16] This testimony relates to Complaint allegation 8(c), above.

going to have a temporary personnel reduction.' And then at that time my workmate, Jose Giron, asked Javier Guerrero, 'Javier, why are they laying off or letting go everyone whose name appears on the letter of the organizing committee that the union sent to the company?' Javier Guerrero told him, 'That is not true, because Nery Mendoza's name does not appear.' And he pointed to another person whose name I don't recall, and he said that that person's name did not appear, either." "I told Javier Guerrero, 'Listen, what are we going to do?' He said, 'How is it possible that you are complaining to me if you are going to get pay for not working? Besides, you are going to have time to think about what you are doing.' And later on he said, 'This is nothing personal. I just take orders. But I want to give you an advice: Look well who is guiding you."[17]

On January 27, 1995, Nery Mendoza was laid off by Guerrero in the same meeting as was Jose Giron and Luis Martines. According to Mendoza, in this meeting Guerrero said they were being temporarily laid off at the direction of those above him. Jose Giron, who was also being laid off asked him why he was firing those employees who were on the list of Union supporters. Javier Guerrero said, "I don't remember what list are you talking about." Jose Giron said, "The list that the union sent to you." Guerrero responded, "I don't remember. Perhaps it didn't get here; wasn't delivered

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[17] Luis Martinez went back to the plant to pick up his final paycheck on January 30 or 31. He got the check and went to the parking lot with some other laid off employees. According to Martinez, Bazbaz came out and told a security guard to get the men out of the lot, he did not want to see them on his property.

by the mail. I haven't seen it. Besides, Nery and Mauro are not on the list."[18]

Mario Perez was laid off on January 27 in a meeting held by Guerrero with the witness and fellow employees Edgar Carrera, Nery Mendoza, Mauro Moran, and Jose Giron. Guerrero told them that they were being temporarily laid off because of economic reasons and would be recalled if the situation resolved itself. Giron asked if they were being laid off because of the list of Union [supporters], and Guerrero answered that he did not know anything about the Union. He then commented that Nery and Mauro were not on the list.

Jose Giron was laid off in a meeting with Guerrero and fellow employees Mario Perez, Nery Mendoza, Edgar Carrera, Alejandro Blasio, and Mauro Moran. Guerrero told the employees they were being laid off because of lack of raw materials. The witness asked Guerrero why they were letting go only those who appeared on the list of the organizing committee of the union. Guerrero named two employees being laid off and noted they were not on the list. These two employees were Nery Mendoza and Mauro Moran. Guerrero added that he knew nothing about the Union.

Lucio Aviles went back to the plant two days after the layoff and asked Guerrero for work. Guerrero told him that he did not know, but that a lot of high density material had arrived. He added that he would have to wait until Bazbaz

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[18] The testimony in the preceding three paragraphs relates to Complaint allegation 8(b) above.

arrived to see what he had planned. Aviles then started to leave and Guerrero said, "You see what you got for being involved with the union?"[19]

Supervisor Fernando Molina

Felix Jovel Palacios was employed by Respondent until he was laid off and was supervised by Sergio Palacios. In the last part of 1994 and the first part of 1995, he was asked by supervisors what was going on about the Union and he would tell them he did not know. One of these supervisors, Fernando Molina, around the beginning of December 1994, asked him what was going on and the witness said he did not know.[20]

Employee Leonel Campoverde worked for Respondent for three years, until he was laid off in January 1995. His supervisor was Fernando Molina. Campoverde testified about a conversation he had in the Company dining room with Molina together with fellow employee Marco Posadas and two others. According to Campoverde, Molina said: "if we were going to think about the union -- belong to the union, for us to do it well because otherwise they were -- we were going

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[19] This testimony related to Complaint allegation 8(c) above.

[20] This testimony related to Complaint allegation 9(a), above.

to fuck up." Molina indicated in this conversation that he knew the four employees were Union supporters.[21]

Supervisor Sergio Palacios

Lucio Aviles testified that on January 27, he and fellow employee Luis Martines were approached by supervisor Palacios who told them that he had seen a list possessed by Javier Guerrero that contained the names of employees who were going to be fired because of their support for the Union.[22]

Supervisor German Robles

Employee Nelson Rodriquez testified that the day before he was laid off, Robles asked him if he had signed a paper for the Union, adding that if he had he would be fired.[23]

About a month after the layoffs occurred, Juan Torres, a current employee, had a conversation with supervisor Herman Robles. Robles told him that "[the] union was for lazy people and that I was going to be sorry being there -- that

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[21] This testimony related to Complaint allegation 9(a) and (b), above.

[22] There was no testimony elicited in the hearing supporting the Complaint allegations regarding Palacios prior other than those relating to events in June, 1995. I however credit and rely on the testimony of Aviles set out above to establish a violation of Section 8(a)(1).

[23] This testimony related to Complaint allegations 11(a) and (b) above, though the dates are not the same.

I was going to regret being there, that the union was going to take away half of my check." The witness testified that Robles asked him if he were in the Union.[24]

Rudolfo Bocanegra began working for Respondent in November 1994, and was employed in packing. His supervisor, Herman Robles, spoke to him about the Union on or about January 25, 1995. Robles told him that he knew that the witness and another worker, Camilio Ramirez, were in the union and that they were going to fire them.[25]

In November, Nicolas Chajon, a densifier operator, was working at his machine when supervisor Herman Robles came to him. Robles asked him if he belonged to a union. Before Chajon answered, Robles said that he knew Chajon belonged to the union. Robles continued by telling Chajon that the Union was a waste of time and what Chajon was going to get was fired. Chajon countered that the Union was

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[24] There is no Complaint allegation to support this alleged interrogation and as it allegedly occurred after Robles admittedly gained knowledge of the Union campaign is in a different posture from those interrogations taking place before January 27. For this reason and because it is cumulative of other similar interrogations, I will not base a finding of a violation on the testimony.

[25] This alleged threat is not contained in the Complaint, but is relied upon to find a violation of Section 8(a)(1) because it occurred prior to the January layoffs and is closely related to other similar threats made by supervisors.

the benefit of all employees. Robles said, "Then you belong to the Union."[26]

Supervisor Cesar Portillo

Mario Perez began working for Respondent in December of 1993 and was employed as an extruder operator. His supervisor was Cesar Portillo. The witness was a member of the organizing committee. In the last part of November, 1994, Perez was approached in the Company dining room by supervisor Portillo. The witness and some fellow employees asked Portillo why the Company had discharged another employee. Portillo said that the employee had been absent without calling one day and was discharged for that. The witness then asked why the Company did not call the employees on days they have no work for them rather than having the employees come to work and then be sent home. Portillo responded that he was not interested, even less interested as he knew the employees were associated with the Union.[27]

Forklift operator Nery Mendoza testified that in mid December, he was checking the oil in the forklift, when Cesar Portillo arrived. Portillo told him to tell him who were the leaders of the union. Portillo continued, "Because if you don't

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[26] This testimony related to Complaint Allegations 11(a) and (b) above.

[27] This threat is not alleged in the Complaint, but is credited and a violation found based upon this testimony for reasons set forth later in this section.

tell me who are the leaders or the bosses, I am going to get you down from this shitty forklift and I am going to send you back to the densifier so you can screw yourself like before. So you think well about it, because it is going to affect your job." Another employee, Alejandro Blasio was in the vicinity when this conversation took place.[28]

Alejandro Blasio began working for Respondent on November 7, 1994, having been hired by Javier Guerrero. He was a densifier machine operator and was supervised by Cesar Portillo. He described a conversation about the Union he had with supervisor Portillo in January. He was working at his machine and another employee Nery Mendoza was nearby. He described the conversation: "On that occasion, I was outside my machine. The supervisor, Cesar Portillo, came by, and he told me that he already knew that I was mixed with this thing of the union. And the worst thing was that my name was on the list of the organizing committee. And he was not a stupid guy, that everyone whose name would be on the list that the organizing committee sent to the union, we would be the first ones to be kicked out or let go to the street. After that, he told me, 'but if you want to cooperate with us, it could be a bonus for you.' He told me, 'Think about it.'"[29]

Mendoza also noted another instance of a threat by Portillo. About the middle of December, supervisor Portillo

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[28] This testimony related to Complaint allegation 12(a) above.

[29] This testimony related to Complaint allegations 12(l), (j), (k), (l) (m) and (n), above.

approached Mendoza and fellow worker Edward Carrera. Portillo asked Mendoza if he "knew who in the hell was distributing papers of the union in that company." The witness said he did not know. Portillo then threatened both men with discharge if he learned they were distributing papers for the Union inside the company.[30]

Jose Americo Rosales began working for Respondent in April, 1991 and worked as a washing machine operator until he was laid off in January 1995. During the first week of January, he had a conversation with supervisor Cesar Portillo at the plant at 6:45 in the morning. Another worker, Oscar Godines was present during the conversation. Rosales testified that Portillo asked him if he were the head or the boss of the union movement. Rosales told him that he did not know why he was asking him that. Portillo responded "Don't play the fool with me. That he already knew why he was asking me that." Rosales then said the was cooperating with the campaign because there were no Company benefits for employees and that it was a fair cause. Portillo continued, telling Rosales that if he continued to (support the Union effort), he was "going to send me to hell. Because the company was not going to allow that. That the company would not allow this thing about unions." Rosales responded that "we were fighting for a just cause. And not only me but possibly all the workers were going to cooperate." Portillo repeated again that "if I would continue doing those shits

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[30] This testimony related to Complaint allegation 12(b) above.

(supporting the Union), he was going to take my job. He was going to fire me."[31]

Oscar Godines worked for Respondent from 1992 until he was laid off in January. He began his employment working on the grinder and was working with the washing machines at the time of layoff. His supervisor for the last part of his employment was Cesar Portillo. About mid-January, while at work, Godines went to look for Luis Castro. He found him talking with supervisor Portillo, who was angrily telling Castro to quit talking to people about the Union because they were going to be fired or their jobs would be taken away from them. Godines heard Castro respond that the reason why the people were getting organized was because they were not happy with the safety of the working conditions and that there was no reason for the conditions. At this point Portillo saw Godines and said, "Oscar, you also shouldn't be surprised if, one of these days, I fire you, because it is known that you are with this thing of the Union, also." Portillo then told Castro that John Bazbaz did not need anyone to tell him how to run his company.[32]

On January 24, 1995, Mario Perez was working at his machine with fellow employee Jose Giron. Supervisor Portillo came to the witness' machine and said, "Already I learned that all my shift attended the meeting of the union, but they are peeling my penis." Giron started to comment but was

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[31] This testimony related to Complaint allegation 12(d), (e) and (f), above.

[32] This testimony, as well as the testimony in the preceding paragraph relates to Complaint allegation 12(d) above.

stopped by the witness. The witness considered Portillo's comment to be a provocation as he consider the words used to be fighting words. A few days before, the employees on the shift had attended a Union meeting. Jose Giron testified about this threat. He remembered that Portillo approached the two men and asked, "What the fuck are you doing here?" The witness said he was looking for trash containers. Portillo said, "I already know that all my shift is in the syndicate or union. But if I know that you are one of the organizers, I want to get you out and I am going to kick you out of the company."[33]

Alejandro Blasio had another conversation about the Union with Portillo on January 24. This conversation took place on his lunch break in the Respondent's dining room. He was with fellow employees Edgar Carrera, Nery Mendoza, and Jose Giron. The employees were talking about the Union when Portillo arrived. Carrera asked Portillo for a helper on his machine and Portillo told him that he was not going to give him a helper, because he was one of the persons involved with the Union. Portillo continued saying, "I know that that thing about the Union is to help drunkards and assholes or lazy (persons) and that we were not going to look at him with the sucker's or fool's face." "That all of us who were involved with the Union were going to be sent to hell." The witness stated that this means getting fired or terminated.

Nery Mendoza remembered this confrontation and testified that Portillo approached the group of employees and said, "that shitty, or that shit of a union, was for the

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[33] This testimony relates to Complaint allegation 12(m), above.

drunkards and lazy people. And those kind of people were the kind of people the union would protect. And if we had in our heads those ideas of the Union, you are better off to take those shitty ideas from your head because it is going to affect your jobs and you are going to be damaged by it."[34]

Cesar Portillo talked with Luis Castro on January 23, 1995, with Portillo asking him how the employees were doing with the Union. He then said "Quit talking to the Union. I will get you a job as a supervisor, a salary raise, and I will talk to Mr. John Bazbaz." The witness responded, "If Mr. John Bazbaz is really as you say, so considerate, tell him to sit with us and let's negotiate a contract." Portillo said that Bazbaz would not take advice from anyone. Castro then told Portillo that he was not the only one, that he had people that would support him from all the different shifts. He then gave Portillo the names of all the employees on the organizing committee, naming specifically, Oscar Godines, Alejandro Blasio, Jose Giron, Lucio Aviles Luis Martines, Edgar Carrera, Mario Perez, Miguel Perez, and himself. Portillo responded that he knew of the ten Union supporters and he knew some other supporters as well. Portillo advised him to stop talking about the Union because it would harm the interests of the Company, which could not pay increased wages and benefits to the employees Castro said that the employees were not asking for something the Company could not give, but only what was necessary according to law.

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[34] This testimony in the two preceding paragraphs relates to Complaint allegations 12(l) and (m) above.

Portillo responded that the only thing that was going to happen was that the Company was going to fire them.[35]

Supervisor Israel Zepeda

At a point in December, supervisor Zepeda had a conversation with employee Montes de Oca in the company dining room. Zepeda told him that if he learned that he was taking photographs (of the Respondent's facility) for the Union, he was going to fire him. At about the same time, Zepeda interrogated employee Guadalupe Leal, asking him what the Union was promising employees.[36]

Agent Carlos Hallatt

On January 27, Hallatt approached Lucio Aviles while he was working and asked if he were involved with the Union. Aviles said he was. Hallatt said he had known for two months. Aviles then told him that to organize for the Union was a noble thing, that he did not feel he was offending anyone that to talk about the Union was to talk about respect and that it was necessary to organize the Company. Aviles told Hallatt that three years ago, the employees had a meeting with John Bazbaz at the company where the employees talked about benefits, salaries, vacation time, and holidays. At the meeting Bazbaz told the employees that by law they had no

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[35] This testimony relates to Complaint allegations 12(n) and (o) above.

[36] These interrogations and threats are not alleged in the Complaint, but I credit the two witnesses testimony and find that the two incidents violated the Act.

right to anything, adding that whoever wanted to continue with the company could do so, and whoever didn't like it that the doors were very wide. Aviles then added, that through the years a seed had been planted and that John Bazbaz was harvesting that seed. After some further conversation, Hallatt told Aviles that he was asking him all of this because he had gone to John Bazbaz's office and that he had seen a list with names, on which he was able to see the names of German Joya, Miguel Molina and Luis Martines. This was a list of employees who were going to be fired because of their support of the Union.[37]

Respondent's defense to this overwhelming mass of evidence of widespread unlawful interrogations and threats is simply to deny knowledge of any union activity until after the January 27 layoff and thus a denial that any such conversations did or could have taken place. Its involved supervisors all testified, as if by rote, that they learned of the campaign in the weeks after the layoff, most of them learning of it from John Bazbaz. Respondent's exhibit 10, a flyer that was distributed to employees on March 30, 1995, is relied upon by Respondent to support its secrecy theory.

The first page of the exhibit reads: "There is no secret any more. News: The Local of the ILGWU is on it. The secret is out. Everything is known. The secret is outside. The company, USA Polymer, was accused by the attorneys of the Government of the United States of North America of

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[37] I do not find a Complaint allegation concerning this conversation, but consistent with my ruling, do find it to have happened, and it constitutes a violation of Section 8(a)(1).

violating the rights of our work mates. After a complaint was submitted by the union ILGWU, we -- your work mates -- will never stop fighting for your rights or ours. If you, my friend, have not joined the fight for justice and benefits in employment for us and our family, go on. Go ahead and do it. If you have a question or you have a problem, call us at this number: 349-8860. Organizing committee of USA Polymer. America works better when we say, Yes, to the union. Union, Yes."[38]

The flyer also invited employees of Respondent to a picnic held by the Union. According to Aviles, several laid off employees did attend, but no present employees showed up, though invited. The flyer announcing the picnic reads: "Invitation to a celebration. Employees of USA Polymer, Incorporated, and their friends are cordially invited this Sunday, April 9, 1995, at 3:00 p.m. until 6:00 p.m. at the office of Ganno [phonetic] on 6006 Villareal Boulevard, Houston, Texas. If you need information, please call telephone number 349-8860. Note: This invitation does not include supervisors or guards. Organizing Committee of USA Polymer, Incorporated."

I do not credit this defense. As noted earlier, I believe that Respondent refused to accept the January 7 letter from the Union because it feared that it would have to recognize the Union if it accepted the letter. I agree with the Charging Party on brief that the testimony of employees Blasio,

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[38] Organizer Medrano testified that the secret was the fact that Respondent had engaged in unfair labor practices contrary to what Respondent was telling others.

Mendoza, Perez and Giron about their meeting with Javier Guerrero on January 27 proves that Respondent knew of the campaign and the identity of the members of the Union organizing committee. As related by each of these employee witnesses, in response to their inquiry of Guerrero as to why he was laying off only the Union supporters, Guerrero denied knowing who was in the Union campaign. He then stated that he knew that employees Nery Mendoza and Mauro Moran were not on the list of members of the organizing committee. Obviously Guerrero could not know who was not on the list unless he knew who was on the list.[39] Additionally, from the standpoint of demeanor of the various supervisors and other management witnesses, I did not find their testimony on the question of when they learned of the union campaign to be credible. They gave this testimony almost as if they had memorized answers. In a four month campaign in a relatively small plant where almost all the production employees were active supporters of the union, attending union meetings and talking about the Union among themselves, I believe it virtually impossible for knowledge of the campaign not to have come to the attention of management and find that it did, prior to the layoff. Further, to believe the simple denials of knowledge by the supervisors, one would have to believe the numerous witnesses who testified credibly about conversations with those supervisors were making up their testimony out of whole cloth. I find this scenario to be impossible given the

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[39] Nery Mendoza was on the list, and Moran was not. This is not important. What is important is that he knew of the list at a time when Respondent asserts no knowledge of the campaign whatsoever.

detail and emotion displayed when the conversations were related.[40]

The interrogations and conversations set out above all are violative of Section 8(a)(1) of the Act in that they clearly tend to restrain, coerce and interfere with employees' exercise of their Section 7 right to organize and support a union. Cumulatively, these interrogations threaten employees with discharge, with loss of benefits, more onerous working conditions, physical harm, and other, unspecified reprisals for engaging in union activities or supporting the Union. They additionally give the impression of unlawful surveillance of union activity. One or more of the interrogations combined the threat of discharge for engaging in union activity with the promise of a benefit if the employee did not engage in such activity.[41] *Wellstream Corp.*, 313 N.L.R.B. 698, 702 (1994);

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[40] I have attempted to resolve all relevant credibility conflicts in this record. If there is an unresolved conflict between the testimony of one of Respondent's employees and one or more of its supervisors, I credit the testimony of the employee. I believe that Respondent's supervisors would say anything that would favor Respondent and deny anything adverse to Respondent, regardless of the truth.

[41] I have found numerous violations of the Act committed by supervisors as alleged in the Complaint and not alleged in the Complaint. The violations found to have been committed fall into the categories summarized immediately above. There is evidence to support findings of additional unpled violations of 8(a)(1), (*See* Charging Party's Briefs for examples); however, these findings would be merely cumulative of findings already made, and made on clearer evidence. Thus, as I do not believe it serves any useful purpose, I will not make cumulative findings o. any unpled

Rossmore House, 269 N.L.R.B. 1176 (1984); *Airport Distributions*, 280 N.L.R.B. 1144 (1986); *Farr Co.*, 304 N.L.R.B. 203 (1991).

D. Was the Layoff of January 27 Unlawful?

Commencing on January 27 and continuing through January 30, Respondent laid off the following twenty nine employees:

Miguel Alanis	Mario Aparicio
Lucio Aviles	Hugo Benavides
Alejandro Blasio	Rodolfo Bocanegro
Edgar Gerardo Carrera	Luis Castro
Nicholas Chajon	Elias Escobar
Julio Hector Garcia	Jose Giron
Oscar Godines	German Joya
Luis Martines	Pedro Molgar
Nery Mendoza	Miguel Molina
Bethuel Montes De Oca	Mauro Moran
Walter Jose Orellana	Felix Jovel Palacios
Manuel Perez	Miquel Angel Molina
Mario Perez	Nelson Rodriquez
Jose Rosales	Lionel Campoverde
Noe Ramirez	

The test for determining whether such an adverse employee action is discriminatory and unlawful is set out in *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980). Therein the Board held that in such cases, the

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violation other than the ones I have dealt with.

General Counsel must make a prima facie case on the issues of employer animus, the existence of protected activity and the employer's knowledge of that activity. Proof of these elements by the General Counsel warrants at least an inference that the employees' protected conduct was a motivating factor in the adverse personnel action and that a violation of the Act has occurred. The employer may rebut the General Counsel's prima facie case by showing that prohibited motivation played no part in its actions. If the employer cannot rebut the prima facie case, it must demonstrate that the same personnel action would have taken place for legitimate reasons regardless of the employees' protected activity. In this regard, the employer has both the burden of going forward with the evidence and the burden of persuasion. It is not enough to articulate a legitimate nondiscriminatory reason. The employer must affirmatively introduce evidence to persuade the Board that the challenged action would have taken place regardless of the employees protected activity and the employer's anti-union animus.[42]

In the instant case the General Counsel has clearly made a prima facie case of unlawful motivation. In the previous section of this decision, I have found that Respondent engaged in numerous violations of Section 8(a)(1) of the Act, including threatening to layoff or discharge employees for engaging in union activity. The credited testimony of several witnesses reflects both knowledge of the activity by the Respondent and the assertion that the layoff

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[42] The Developing Labor Law, Third Edition, 1992.

was in retaliation for union support.[43] The timing of the layoff, coming shortly after the employees signed authorization cards and the letter naming the organizing committee was sent to Respondent also strongly supports the General Counsel's position.

In the face of the very strong presentation by General Counsel, Respondent has offered two defenses. The first of which, lack of knowledge of the Union activity prior to the layoff, I have already discredited. The second defense is that the layoff was motivated by economic factors and would have occurred regardless of anti-union animus and knowledge of the employees' protected activity.

Prior to the January, 1994, layoff, Respondent had only been profitable for two months in its history. It introduced an exhibit which reflects its economic performance from January 1994 through June, 1995.[44] The exhibit reflects:

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[43] For example, Luis Martinez testified that on January 27, he was told to report to Guerrero. Guerrero told him to sign a paper, but hid what the paper said. The witness said he could not sign without knowing what he was signing. According to Martinez, Guerrero said, "I want to tell you the trust. This is a policy of John Bazbaz to fire all those from the union. This is why we are going to give lay-off to all of them." The witness asked why all the employees were being laid off when there was so much work to be done. Guerrero replied, "That is the boss' policy."

[44] This exhibit was updated at the October hearing to show performance in the second quarter of 1995. It was also corrected to reduce accruals in the amount of $ 68,000 previously charged against the first quarter 1995 earnings. This reduction in accruals

Statement of Income
January 1994 - June 1995

Month	Sale $	Operating Expense $	Income (Loss) $
Jan 94	395,012	440,724	(45,712)
Feb 94	365,584	405,193	(40,609)
Mar 94	379,904	421,238	(41,334)
Apr 94	352,566	406,030	(53,564)
May 94	241,254	365,226	(123,972)
Jun 94	322,419	389,029	(66,610)
Jul 94	320,782	325,648	(4,866)
Aug 94	421,449	505,925	(84,476)
Sep 94	541,303	527,696	13,607
Oct 94	577,971	560,484	17,487
Nov 94	633,803	647,421	(13,618)
Dec 94	537,913	618,174	(80,261)
Jan 95	492,774	497,510	(4,736)
Feb 95	464,887	500,851	(35,964)
Mar 95	599,421	622,021	(22,600)
Apr 95	417,176	441,164	(23,989)
May 95	368,930	380,415	(11,485)
Jun 95	216,462	240,527	(24,075)
Totals	$ 7,648,600	$ 8,295,277	($ 646,677)
Correction of Previous Accruals	(68,009)		68,009
		$ 8,227,268	($ 578,668)
Corr. Totals	$ 7,648,600		

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would make the first quarter marginally profitable.

A large part of the loss shown by the company for December was caused by a very large accelerated depreciation charge for equipment purchased in 1994. Depreciation of equipment, which had been about $ 5000 monthly, was increased to $ 50,000. In the following three months, depreciation was carried at about $ 10,000 per month.

Both John and Issac Bazbaz testified about the decision to layoff employees. They do not contend that losses per se caused the layoffs. Rather, they took two positions with respect to raw material problems that they say forced the layoff. First, John Bazbaz testified that Respondent had difficulty finding raw stock for the HDPE production because of intense competition for raw materials.[45] This was somewhat

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[45] Vladimir Ivanov is a chemical engineer and was the quality control manager for Respondent from November 1992 until his permanent layoff in September 1995. With respect to the matter of HDPE production, he testified that there are differences in quality and type of raw materials which affect the type and quality of finished HDPE. Respondent's customers have varying specifications for the finished product made by Respondent, which call for different types and quality of raw materials. Thus, there are times when Respondent may have a substantial inventory of raw materials, but not have exactly the right material to produce what its customers are asking for. This problem is compounded by the need to purchase raw materials at a price that allows profitable production, which was difficult in the market for raw materials that existed at the time of the layoff. He also testified that Respondent cannot switch from running one kind of material to another easily. It requires cleaning of the equipment and resetting it for a new application. The Company needs to run its equipment virtually non stop to produce enough product to be profitable. Lack of proper

modified in later testimony by both John and Issac Bazbaz to the position that Respondent had difficulty in securing sufficient raw material for HDPE production at a price that would allow them to process it and make a profit. The Bazbaz's testified that they initially determined that the layoff was to be temporary. General Counsel noted that in a position paper filed in February 1995, in response to the RC Petition filed by the Union, the Company advised the Board that it was planning to significantly increase the workforce. Bazbaz testified that at that time and for several months previously, the Company was engaged in the installation of a conveyor system to automate and increase production of HDPE at a lower cost per pound produced.[46] According to Bazbaz the increased production did not occur because the market conditions affecting its ability to profitably process and sell HDPE did not improve. Respondent introduced its exhibit 2 which reflects the rapid rise in HDPE raw stock cost as well

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raw materials causes the shut down of the operation, leading to losses. He in effect disowned Respondent exhibit 2 which gives volumes of raw material purchased, saying that he would have to have a detailed breakdown to the material in inventory and the orders the Company had at the time, to see if it had the correct materials on hand to produce the kind of product its customers wanted at the time. Ivanov admitted that Respondent could use whatever inventory it had at any particular time to produce inventory of finished product to meet future demands for the product and thus avoid down time. Ivanov testified there are problems with this approach, one being price and the other being the unpredicability of its incoming orders for finished product.

[46] All work on this conveyor system ceased in or about May, 1995, when a decision was made to cease production of HDPE.

as similar figures for the polypropylene raw stock. This exhibit reflects:

Monthly Average Cost Per Pound
of HDPE and Polypropylene
HDPE

Month	Pounds	Cost	Cost per Pound
Jan 94	593824	47989	0.080813507
Feb 94	593908	57094	0.096132734
Mar 94	1453444	132851	0.091404278
Apr 94	838702	76008	0.090625753
May 94	870246	93239	0.107140969
Jun 94	948712	100676	0.106118611
Jul 94	1073786	105397	0.098154567
Aug 94	1611808	183802	0.114034674
Sep 94	1110438	144068	0.129739796
Oct 94	1229140	221428	0.180148722
Nov 94	1546989	270206	0.174665754
Dec 94	1545954	313037	0.202487914
Jan 95	1073110	240562	0.244172732
Feb 95	959781	235205	0.245061128
Mar 95	1067108	276313	0.258936302
Apr 95	1018775	272958	0.267927582
May 95			
Jun 95			

Monthly Average Cost Per Pound
of HDPE and Polyproplene
Polypropylene

Month	Pounds	Cost	Cost per Pound
Jan 94	565229	41648	0.07368341
Feb 94	181621	11420	0.06287819
Mar 94	223900	12057	0.05384993
Apr 94	140870	10509	0.07460069
May 94	268613	18266	0.07172400
Jun 94	210595	14272	0.06776989
Jul 94	413774	25297	0.06113723
Aug 94	698411	35366	0.05063563
Sep 94	342100	31455	0.09194679
Oct 94	430454	66016	0.15336365
Nov 94	338822	41473	0.12240350
Dec 94	208113	18658	0.08965321
Jan 95	469554	55027	0.11718992
Feb 95	300550	42934	0.14285143
Mar 95	709802	88966	0.12533917
Apr 95	224677	23773	0.10580967
May 95			
Jun 95			

Respondent also introduced its production figures for both types of product it processes by month for the period January, 1994 through June, 1995. This exhibit reflects:

Monthly Production of HDPE and Polypropylene

Month	HDPE	PP	Total
Jan 94	988900	206800	1195700
Feb 94	1009800	232000	1241800
Mar 94	1193500	346500	1540000
Apr 94	990000	393800	1383800
May 94	1024100	325600	1349700
Jun 94	740300	518100	1258400
Jul 94	1321100	363000	1684100
Aug 94	1133000	442200	1575200
Sep 94	1072500	325600	1398100
Oct 94	1089000	438900	1527900
Nov 94	1197900	617100	1815000
Dec 94	1097800	401500	1499300
Jan 95	793000	583000	1376000
Feb 95	614100	502900	1117000
Mar 95	582000	407600	989600
Apr 95	170800	683900	854700
May 95	677739	780862	1458601
Jun 95	301218	540499	841717

As can be seen from the foregoing exhibits, the HDPE raw material prices doubled June, 1994 to January 1995. According to the Bazbaz brothers, because of these escalating raw material prices, it was decided in mid to late January to reduce operating time or production by about 30%, primarily on the HDPE production line.[47] Support for their decision to

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[47] This 30 percent cut in operating time inexplicably resulted in a 45 percent reduction in employees, all Union

have the layoff, though not necessarily for the timing of the layoff, was given by an expert witness called by Respondent. [48] He gave a thorough picture of the polyethylene or HDPE recycling industry and the forces driving the industry over the last year. This expert witness was Michael Kopulsky, He is the founder and CEO of Envirothene, Inc., of Chino, California, which is a recycler of post-consumer high-density polyethylene. It produces a post consumer recycled-content pellet as does Respondent. Envirothene has been in business since October of 1990.

Kopulsky testified that he regularly studies the market conditions in the post-consumer recycling area as part of his job. He obtains information on this subject through plastics industry periodicals, such as *Plastics News*, and *Modern Plastics*, He also reviews the waste industry periodicals,

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supporters. Following the January layoff, four other employees quit their jobs with Respondent so that in fact it lost 51 percent of its workforce. General Counsel and the Charging Party argue that the variance between the Bazbazs' stated intention to cut production by 30 percent and the 45 - 51 percent reduction in employee complement support a finding that the true reason for the layoff was to get rid of Union supporters and not to solve a temporary economic problem.

[48] Though Respondent's exhibit 2 does show that prices doubled between June 1994 and January, 1995, they also show that the prices took one of their biggest jumps in the period August - November, 1994. During this period of rapidly escalating raw material prices, the Company experienced two profitable months, September and October. It also had only a small loss in November and in December, if the accelerated depreciation figure for December is taken into account.

"Waste Age," and "Recycling Today," as well as a service called ISIS [phonetic], which provides polyethylene industry information. He additionally has conversations with product packagers, including Proctor & Gamble and Lever Brothers, who give him an indication as to the consumer base and where the market is going. Kopulsky's company supplies the companies who make bottles and other containers for Proctor & Gamble and Lever Brothers.

Kopulsky has written many articles on the subject of post-consumer recycling and the market conditions affecting this business for *Plastics News* and other publications. He has spoken on the subject on numerous panels and before a number of seminars. He is familiar with Respondent as they are both recyclers of post-consumer plastics in different regions of the country. The two companies do not ordinarily come across each other because the general rule in recycling is that if you venture more than 5- to 700 miles away from the plant, the freight costs become prohibitive to selling to other marketplaces. However, he has in the past subcontracted work to Respondent that was to be delivered outside Envirothene's geographic market area and inside the market area of Respondent.

Kopulsky testified that post-consumer recycling emerged in the late '80s, '89, and its viability, in his opinion, is still yet to be proven. He does not know of any post-consumer recycler who is doing well right now. What triggered his investment in the post-consumer plastics area was the January issue of *Time Magazine*, which made evident for him that the paper industry had a recycling infrastructure; the aluminum and the glass industry had recycling infrastructures, and the plastics industry players who were

primarily petrochemical companies had not established an infrastructure and had no desire to establish a recycling infrastructure.

Hence, a cottage industry of post-consumer plastics recyclers started to emerge in early 1990, late '89. One of the problems facing the producers in the industry is finding equipment that will do the processing efficiently and with good quality. There was and still is no standard equipment made that will do the involved task well. It took from six to nine months from installation to work out the problems with the equipment and achieve both efficiency and quality. A producer of HDPE constantly strives for a balance between quality and quantity. This goal was affected by the quality of raw material being processed. Certain post consumer HDPE products are of different grades of high-density polyethylene and often contaminants were supplied in the raw material.

The other major problem facing the new industry was finding a market for its product, as most users of polyethylene were used to using virgin product and were adverse to the idea of using recycled HDPE. Thus Kopulsky and others introduced legislation in California to require use of a percentage of recycled product in the manufacture of new HDPE products. When this legislation passed in California and Oregon, it had a dramatic effect on demand. Certain large users of such products, including Proctor & Gamble and Clorox, opted not just to use the mandated 25% recycled material for the states passing such legislation, but to use the recycled material in all of their containers. This decision created a demand that far outstripped the availability of recycled material in the nation. As a consequence, the waste industry, which collected and sold the raw materials to the

recyclers, sensed the shortage and started hiking the price of raw materials on a daily basis. This created two problems for the recyclers. Their customers had a practice of demanding thirty days notice of price hikes from virgin material suppliers, which practice they applied to the recyclers. Second, the price for recycled material was in competition with the price of virgin material. The recyclers had experienced raw material prices from 1991 through June of '94 of 10 cents a pound, which would be $ 200 a ton. This increased to $ 700 a ton in the last quarter of 1994.

Kopulsky estimated that about 50% of the pure recyclers, like his company and Respondent, fail. Other recyclers, who use the material they recycle to manufacture products such as plastic lumber themselves, fail at a higher rate. According to Kopulsky, the key to surviving is familiarity with the marketplace and processing efficiencies. It takes processing expertise to make it work, because recyclers are constantly getting pressures from two mature industries: the plastics product manufacturers or packagers on the top end who are the recyclers customers and on the other end, the waste industry who are constantly negotiating to get the highest price for the raw materials they collect. This price compression, combined with the plastic industry's 30 day price notice practice, caused Kopulsky's company and others like it to take major losses. In October 1994, Envirothene, Inc. was in a break even situation, but since that time, the compression in the price spread between the raw materials and the processed HDPE, which Kopulsky believes is an aberration and not a permanent condition, caused Envirothene, Inc.'s spread to move from 18 to 20 cents per pound down to 14 or 15 cents a pound. This raised the cost of

goods sold percentage from its norm of 70 percent to 94 to 96 percent, where it is impossible to make a profit.

According to Kopulsky, this compression affected every post consumer plastic recycler. Most decided to scale back production until the supply demand ratio fell into place and a profit was possible. On the other side of the equation, the customers of the recycled plastic found the price for recycled plastic exceeding that for virgin material. At this point, many of these manufacturers changed their decision to use recycled plastic for all their containers and began using this material only for containers destined for the states where laws required the use of recycled plastic. The effect of this decision hit the marketplace in April - May, 1995, when demand for recycled HDPE fell dramatically. Recylers saw orders for their product come to a standstill. Kopulsky's company was producing about a hundred thousand pounds of product a day and within a ten day period had a million pound inventory, and no market for it. According to Kopulsky, this problem was faced by recyclers across the country. He noted that Quantum Chemical in Ohio and others were attempting to dump their inventory. Those who decided to sit on it and see if they could get rid of it slowly could do so for a period, but they were, in a sense, affected by those who chose to dump, because those who chose to dump were the companies with the deepest resources and could afford to write off the inventory. The drop in demand for recycled material was matched by a drop in demand for raw materials and the price dropped from 35 cents per pound to about 13 to 15 cents per pound. Those manufacturers without high priced inventory were able to again produce at a competitive price and take business away from those who were forced to try to sell their inventory at a profit or break even point.

The market situation which existed in April-May, 1995 forced Kopulsky's company to reduce its workforce from 36 production employees working on four shifts of nine people each to three shifts of six people per shift, or 18 employees, a fifty percent reduction. Administrative positions were reduced from 6 to 4 In January, 1995, when the Respondent decided to layoff, At this point it should be noted that Respondent did not cut any administrative or supervisory positions at the time of layoff and in fact added administrative people in the months following the layoff. Kopulsky's company was engaged in a major expansion project, as he evidently did not see a problem coming at that time. Since taking the reduction in force, the company is very selective in the business it seeks, taking only profitable business and turning down orders that would not produce a profit. It has also tried to increase automation to achieve greater production efficiency. From an industry standpoint, the recyclers are engaged in an education program to increase recycling and the use of recycled materials.

Kopulsky considers reducing production time a viable solution to the mounting financial losses, until a company can control costs and make money. Laying off employees would necessarily follow a cut back in production. On the other hand, he ties cut backs in percentage of production to an equal percentage cutback in employees, which certainly was not the case with Respondent. With respect to the process of selecting employees for layoff, he looks at work performance and the ability of employees to perform more than one function. He would also consider attendance because with a reduced workforce, attendance becomes more important. When making the selection for layoff, he would look for a person who had for example, an electrical background and a

background in quality control and would retain that employee over one with more longevity and less ability. He believed retaining an employee with electrical experience would be important because of the need to do routine electrical work on an immediate basis, such a changing fuses. In this regard, it should be noted that Respondent fired its most senior employee, Aviles, who had just such a background. Kopulsky also tried in his own business to cut costs wherever possible, including beginning to use permanent boxes for storage over temporary ones that to be replaced constantly. On the matter of cutting costs to save money, Kopulsky agreed that one would look to cutting administrative costs, so long as it did not negatively affect the company's long term market position. He would add to administrative costs only if it would result in an overall savings. In this regard the continuation of consultants to improve HDPE production when it has been cut back or off does not make much sense. Yet this is what Respondent has done. It also added additional administrative personnel following the layoff and did not layoff any supervisors.

When Kopulsky laid off people they eliminated shift supervisors on the shifts which were eliminated and made those eliminated shift employees. Although he did not know if it happened at his plant, he agreed that it would make sense to reduce the salary of a supervisor who was demoted to a shift employee position. At Respondent's facility, all supervisors received wage increases at the time of layoff and a number of employees, most notably, those not supporting the Union, also received a raise.

He testified that he did not reduce his workforce until April because, perhaps, he was too concerned about losing

customers, and not concerned enough about the bottom line. Through that time, he still had customers who were demanding material, and he was doing everything in his power to service those customers and keep from losing the customers. He gave the opinion that he should have been less service-oriented and been more bottom-line oriented. Until April, his company had pressing demand for product, but at price spreads that were causing large losses.

During some time in the end of 1994 or the beginning of 1995, it tried to subcontract some work to Respondent, but was rebuffed, with Respondent telling him that it could not provide the material for him without losing money. Kopulsky also testified that Respondent was also having a problem at the time obtaining raw materials as one of its competitors, K W Plastics, was buying up all raw materials in the Houston area. John Bazbaz told him that Respondent was having problems sourcing the material at a price he could make money. He testified that respondent was more of an order oriented supplier, that is, planning production and buying raw materials to meet existing orders, than a company like his which was producing material in anticipation of orders. In this regard, he believed Respondent was alerted earlier to losses than his company.[49]

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[49] On this point, the Bazbaz's testified that in part their decision to cut production in January was based on an article they read which indicated that Proctor & Gamble was cutting back on its use of recycled HDPE in its container production. Bazbaz testified that after this announcement, the demand for his company's goods slackened. However, the availability of raw material still did not meet total demand and the price for such material remained high. Bazbaz contends that Respondent was not always able to pass

I have considered Respondent's evidence carefully, and relying primarily on that evidence submitted by Kopulsky, I believe that the evidence in its entirety supports a finding that though a layoff of Respondent's employees was inevitable and would have occurred at some time before June, 1995, its timing and severity were dictated by anti union animus. Respondent has used a broad brush approach in both its testimony and its exhibits to support its contentions that economic necessity caused the January layoff. It has in its records the information necessary to demonstrate with specificity the orders it had in January, the material it either had or was buying to fill these orders, and the price it could charge for the finished product and the price it paid or would have to pay for the raw materials needed to fill the orders. It did not produce such information. Its own witness, Ivanov, indicated that such information is necessary to accurately say whether the Company could profitably produce orders at any given time.

Further support for the position that the layoff, or at least the timing of the layoff was discriminatory is obviously found in the mass of Section 8(a)(1) violations I have found to have been committed in the previous section of this decision. It is also supported by the timing of the layoff,

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through the rising cost of raw materials to its customers because it had promised a price before it purchased the raw materials. On the other hand, Proctor & Gamble was not shown to be a customer of Respondent, and the same article did not influence Kopulsky to cut back his company's production. Moreover, as note by Kopulsky, Respondent was not a company like his that was producing in advance for the mass market that would be seriously affected by the Proctor and Gamble decision.

coming almost immediately after the bulk of authorization cards were signed by its employees. It is supported by the large number of employees laid off, relative to the size of the production cut, i.e., a 30% production cut and a 45% reduction in employees. This reduction in employees grew to 51% when Respondent did not replaced workers who quit or were fired after the January layoff. It is also supported by the evidence relating to overtime paid after the layoff, which appears to me to be determined effort to keep from recalling any laid off employees.[50]

The General Counsel and Charging Party assert that excessive overtime has been used to sustain Respondent's production levels and to avoid recalling any of the laid off employees. The Charging Party points out on brief that from February 21, through May 30, Respondent permitted 1,415.5 hours of overtime to five of its supervisors and 3,963.25 hours of overtime to non-supervisorial employees, for a cumulative employee and supervisor overtime total of 5,378.75 hours. This is enough overtime to have rehired 8.4 employees on a full time basis. There is evidence in the record of overtime worked by supervisors and employees both

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[50] Respondent offered testimony to the effect that overtime is worked post layoff because materials many times do arrive at the scheduled time. This situation causes the production schedule to be delayed and that generates a delay in the delivery of materials to the customer. That creates an urgency and the need to process them immediately, thus sometimes causing overtime to be used to be able to process the material more rapidly. No concrete example of such an occurrence was given in the record and certainly such situations would not explain the very large amounts of overtime worked post layoff.

before and after the layoff. I have compared the overtime hours for supervisors and those employees who were not laid off for comparable periods before and after the layoff, and total overtime hours for the same period for all employees. This comparison reflects that supervisors are working almost twice as many overtime hours in the post layoff period as was the case in the pre layoff period. Non supervisory employees are working about 56 hours overtime in the post layoff period as opposed to an average of about 45.5 hours overtime in the pre layoff period.

Following the layoff, Respondent also took some economic steps which are inconsistent with its alleged financial difficulties. First, it granted all of its supervisors 50 to 75 cent per hour pay raises. Bazbaz testified that the supervisors were given a raise because they were going to have more responsibility or take on extra jobs after the layoff. This may have been true, but it is still inconsistent with Respondent's plea of poverty. So is the fact that it continued to pay Hallatt's company a substantial sum of money for consulting work and began paying Guerrero $1615 bi-weekly. Bazbaz testified that some cost savings measures were considered, but reducing management salaries or workers wage rates were not considered. Bazbaz, for example, did not consider cutting his annual salary of $ 120,000. Bazbaz cited the automating of a bagging process as a cost savings measure taken by Respondent, but he did not know whether this was done before or after the layoff. Reducing overtime was not feasible as Bazbaz contends overtime is caused by factors beyond management's control. The reason for this was described by Bazbaz thusly, "you don't know at what time you are going to receive the materials because they are so scarce and so difficult to get that you have people sometimes

waiting for the materials. And when the materials come in, they have to continue working until they get the materials out." He amplified that Respondent did not acquire raw materials "because the customer could not pay a price that would enable us to process the material and be profitable." Again, no specific examples or evidence of such a situation was offered.

Respondent's actions with respect to Luis Aviles also strike me as being discriminatorily motivated as opposed to having been dictated by economics. As noted earlier, Aviles was the Respondent's in house electrician and was its most senior employee. Until the Union campaign his work had evidently been adequate and he performed tasks both for Respondent and its sister company, Polytex Fibers. Indeed he was given pay raises in October and November 1994. However, by the time Guerrero and John Bazbaz testified in this proceeding, he had become an inadequate worker, called slow and not possessed of the necessary skills for his job. Guerrero after the fact testified that the raises given Aviles were unwarranted. After the criticism of Aviles work was leveled by Guerrero, he shifted his focus somewhat and testified that the main reason Aviles was laid off was because the company did not need in house electrical maintenance anymore as the problems it had were minimal. Guerrero testified that he recommended after the layoff that Aviles position be eliminated. He testified that some installation work was performed post layoff by electrical contractors, and though Aviles could perform the work, he could not do it in the same time as the outside contractor. He testified that Aviles did not have the experience or speed at this type work. There is no proof that the work performed by the outside contractors could not have been done, at least in substantial

part by Aviles and at a substantially reduced cost as he made $ 8.50 an hour and the contractors charged from $ 8 to $ 19.50 per hour.

I agree with General Counsel and the Charging Party that Aviles position was eliminated primarily to keep from having to recall Aviles. Bazbaz seemed particularly hurt by his oldest employee's support for the Union. Support for this position can be found in a post layoff conversation Aviles had with Bazbaz. Aviles and Union organizer Medrano had had a run in with Bazbaz in March when they tried to handbill the plant.[51] Later that same day, Aviles saw Bazbaz at a chiropractic clinic to which he had taken his wife for treatment for an injury suffered in a car accident. Aviles also

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[51] In March, 1995, Union organizer Medrano and Aviles attempted to handbill the Respondent's facility. According to Medrano and Aviles, Bazbaz saw them and motioned to a security guard who was not paying attention. Bazbaz personally approached the two men and told them not to handbill in the parking lot and told the guard to call the police. Medrano told him to call the police that they were not handbilling on Bazbaz's property. According to Bazbaz, he observed union supporters handbilling employees, and talking with his security guard. Bazbaz testified that he approached the three men and told the guard to "let these people do whatever they wanted to do as long as they were not in the parking lot and not disturbing the traffic and it was okay for them. Bazbaz then testified that Medrano said the if he did not like it to call the police. Bazbaz did not call the police. This confrontation is not alleged in the Complaint to be a violation of the Act and I will not make such a finding. There is little if any evidence in the record about Respondent's rules regarding solicitation and distribution and no actual proof about whether Medrano and Aviles were on Company or public property at the time of the handbilling.

had his children with him. By coincidence, Bazbaz came in to be treated and seeing Aviles, sat near him. According to Aviles, Bazbaz told Aviles that he was surprised by Aviles attitude, that he was a supervisor and a supervisor could not be involved with the Union. Bazbaz added that the person with whom he had been distributing flyers earlier that day was very aggressive. He asked if this person belonged to Aviles' church. Aviles said no and Bazbaz told him that he had read a lot of literature regarding unions, and that unions are worse every time. Bazbaz said that the ILGWU in some previous years had approximately 300,000 members and now they have 150,000. Bazbaz continued saying that in unions members have to pay dues and that unions live off those dues.

Bazbaz then said that he was paying Aviles well when he was working for him, and asked if he were making it on unemployment. Aviles answered that he was not. Bazbaz said if he called Aviles back to work, he was not going to give Aviles the same position of trust that he had had. Bazbaz then said that he knew that all the people inside the company who were involved with the union. Then he told Aviles that whenever he wanted to go and talk to him, he could go to his office, that the doors were open for him. Aviles told him he was ready to go back to work then. Bazbaz said he was scared of the situation because at this time he cannot buy materials easily. The work is very slow and he did not believe it is going to be resolved or it is going to be better.

Bazbaz testified about the meeting with Lucio Aviles at the chiropractic clinic. Bazbaz confirmed this meeting occurred the same day that the confrontation with Aviles and Medrano had taken place. Bazbaz testified that he walked into the clinic, saw Aviles and sat at the end of the room. Aviles

come to him and sat down next to him. Aviles asked if Bazbaz would give him a job, and Bazbaz responded that Aviles had been in a supervisory position and that he would not be able to get that position back. On the other hand, he told Aviles that if a position for Aviles became available, he would hire him back. At some point after this conversation, Bazbaz eliminated the electrician's position at the plant and subcontracts that work and indicated no interest in reviving the electrician's position.

Aviles problems with Respondent began with it gaining knowledge of his Union activity. Almost immediately prior to Respondent gaining such knowledge, it gave Aviles raises and offered to make him a supervisor. I do not credit any of the testimony about Aviles performance being unsatisfactory as it flies in the face of demonstrable conflicting evidence. I do credit such testimony for the proposition that Respondent was trying to create a valid reason for discharging Aviles and thereafter doing away with his position. I find that Aviles, individually, was discharged for his Union activities and his position eliminated for the same discriminatory reason.

I further believe and find that the process used to select employees to be laid off was discriminatory and aimed at ridding Respondent of known Union supporters. Javier Guerrero selected the number and identities of the employees to be laid off following the instructions of John Bazbaz. John and Issac Bazbaz and Guerrero all testified about the manner in which the number of employees to be laid off was selected. John Bazbaz testified that it was decided to have a 30 percent reduction in the operating time on the machines and the people that work on the machines. He later testified that it

was decided to slow the production by about 30 percent. Issac Bazbaz testified that was decided to cut operating time on the machines by about 30 percent because production was dropping substantially from a high in November. Guerrero first testified that Bazbaz told him to carry out a reduction which would involve 30 percent of the people. In later testimony, this changed to 30 percent of production capacity. As noted earlier, General Counsel and Charging Party assert these different versions of what was intended with respect to the layoff is significant because over 45 percent of the production employees were laid off, not 30 percent. Twenty nine production employees out of a total of 64 production employees were laid off in January. Additionally, four more production employees left Respondent's employ after the layoff and before the June hearing in this case without any employee being recalled to replace them, thus raising the percentage of workforce reduction to 51 percent. I agree with their position in this regard and also with their contention that excessive overtime has been used to sustain the large cut in workers and to keep from recalling laid off employees.

John Bazbaz directed Guerrero to choose the workers for layoff, taking into consideration tardiness, absenteeism, skills and warnings. After testifying about these factors several times, he added that another factor was the employees' ability to work flexible schedules. Guerrero did as he was told and developed a list of employees to be laid off. Bazbaz testified that Guerrero did not discuss the list with him, instead simply telling him that there were about 28 workers that they needed to layoff to get production to the desired level. Bazbaz asked Guerrero if he had taken into consideration when making the list the criteria given him, namely, warnings, tardiness, skills, absenteeism and

flexibility. Guerrero assured him he had and then took the list to the personnel department to prepare layoff letters.

Maritza Patel, Respondent's Human Resources Manager was asked by Guerrero to check the files to determine employees attendance, absenteeism and warnings She set up a computer program which contained employees' names, number, expiration date for their work permit, department number, warnings, shift, times tardy and times absent. The tardiness and absenteeism columns cover the months of October, November, December and January. The warnings column covers the employees' entire employment history. This program was created a day or two before the layoffs occurred and the printout from it was given to Guerrero. Patel denies knowledge of any union activity at the time the list of employees to be laid off was prepared.

Guerrero testified that he was to make sure that certain machines remained operational and to select employees to be laid off based on warnings, attendance and tardiness. Guerrero took the list supplied by Patel and marked the names of employees to be laid off, primarily the ones with warnings. This manner of weighting the factors had the obvious effect of putting more senior employees at risk as they would have had a longer period of time to receive a warning than a new employee. The newest employees at the Company were also the only ones who did not sign authorization cards. In any event, Guerrero testified that he maintained enough persons by department and shift to keep operations going. Guerrero testified, for example, that in the extruder area, there were four working groups of five employees each. He reduced that number to three. In the grinding department there were three work groups, which he reduced to two. In each work group

of five employees, that number was reduced to three. In the washing operation there were four work groups, which were reduced to two. One work group was reduced in the densifier department. Positions such as packing were reduced as there was not going to be as much product to pack. The materials receiver position was eliminated as there was not enough materials being received to justify the position.

Guerrero testified that he tried to keep the employees who had the best record, and those who could handle more than one machine. This I do not believe nor do I believe his testimony to the effect that he considered employee flexibility in determining who was to be laid off. The list of laid off employees appears to me to have been prepared with an eye to defending it, as it more than anything shows that persons were laid off mechanically without thought being given to individual's abilities and experience. As noted above, the list was weighted in favor of the newest employees, those with the least experience and demonstrated ability, but who were also not in support of the Union.

At the time of the layoff, Guerrero created a new classification group for employees, a "cross-trained utility group. He testified that this is a group of employees who know how to operate more than one machine and can work any shift. He used this group to give support in the positions that he needed to cover. Strangely, this group, which one would have assumed would have the most skilled employees is made up in large part with the newest and least experienced employees, including those employees who did not sign authorization cards. Group member Jeronimo Perez was hired by the company on November 15 of 1994. Group member Antonio Pivarel was hired on January 16 of 1995. Group

member Rene Iraheta was hired on December 27 of 1994. Group member Jose del Cid was hired on December 5 of 1994. Group member Otto Barreno was hired on January 11 of 1995. Group member Orilio Barreno was hired on January 11 of 1995. These were the last persons hired by the Company before the layoff. It is also interesting to note that Oscar Barreno had accumulated four tardies by the date of layoff and his cousin Orilio had accumulated five tardies by the time of the layoff. Guerrero said they were retained because they did not have absences or warnings and were flexible in work schedules. Guerrero was asked if it made any difference to him in the selection process that these men had accumulated four or five tardies within the two weeks they had worked for Respondent. He indicated that he was aware of their tardiness, but excused it because of weather or car trouble. Excuses for absences and tardies were apparently not considered with respect to the employees laid off though the evidence establishes that absences and tardies were routinely excused by Respondent.

All supervisors were retained regardless of their record with respect to absenteeism or warnings. It was pointed out that Sergio Palacios had 32 tardies and Guerrero excused this saying that Palacios had a very flexible schedule. It was pointed out that Cesar Portillo had 13 tardies and Guerrero had the same answer. The same was true for Fernando Molina who had 11 tardies. Erick Hernandez was retained with 11 tardies and Javier Garcia was retained with 17 tardies. Employee Homero Alfaro was retained with 18 tardies, and Guerrero explained that he was a mechanic with extensive experience. It was pointed out that laid off employee Miguel Molina was also an experienced mechanic and only had 5 tardies.

Guerrero testified that at the time of layoff they had eliminated all the persons that it could afford to eliminate and still keep the company running. Yet, subsequent to the layoff, four employees have quit and have not been replaced. Guerrero said this was accomplished by modifications to equipment that have made the operation more efficient and made it unnecessary to replace these four employees. I cannot find any hard evidence of what these modifications might have been. Work on the conveyor system modifications ended in May, 1995 without the modifications being completed.

During the hearing, Charging Party presented the testimony of statistical expert Mary Burns, who testified as to the statistical probability that the employees selected for termination could have been selected for non discriminatory reasons. During her testimony, Ms. Burns showed that there was only a 4.26 chance that 20 union card-signers could be terminated in a reduction in force out of 64 employees, where 59 of 64 employees were card signers. Ms. Burns also demonstrated that the probability of selecting 29 persons for layoff, 9 of whom were members of the 10 person organizing committee, from a group of 64 employees, was .00245, significant less than one percent. She demonstrated that the probability that 16 of the 19 attendees at a January 18, 1995 card signing/union organizing meeting would be among the 29 people selected for termination was only .00546 or 1 in 18,310. Ms. Burns offered that such odds were statistically significant deviations.[52]

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[52] Statistical evidence is admissible to show the probability that a mass termination could have occurred for a non-discriminatory reason. Statistical evidence may support an inference

In conclusion, I find that Respondent has failed to adequately rebut General Counsel's strong showing of discrimination in the layoff of January 27 for all the reasons set forth above. Although I also believe that a layoff of some level would have occurred at some point well after January 1995, but before June, 1995, I believe that this matter can best be determined at the compliance stage of this proceeding. Therefore I find that as alleged in the Complaint, the January 27 layoff and the process used to select employees for layoff are in violation of Section 8(a)(3) and (1) of the Act.

E. Was Respondent's Post-Layoff Call In Requirement Unlawful?

Respondent gave each laid off employee a letter dated January 27 that required that each of the employees laid off to call in daily, Monday through Friday, and their failure to do so could result in their being terminated. Maritza Patel prepared the letter from a form letter obtained from a company that advises Respondent on unemployment matters. She added to the letter the times the employees were to call in and the name of the person to call in preparation for the layoff. The letter reads as follows:

> "You are part of a temporary reduction in force. As this reduction is 'temporary' you are subject to be recalled on a daily basis. Part of your responsibilities to maintain your

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of unlawful motivation. *NLRB v. Cameo, Inc.*, 340 F.2d 803 (5th Cir. 1965). Certain statistical evidence submitted in rebuttal by Respondent is not considered relevant by me as it is not based upon accurate base figures.

> eligibility to work with our company is to call every workday morning, Monday to Friday, between 10:30 a.m. to 11:00 a.m. to determine if you are one of the employees to be recalled that day. Call Rosa Benitez at (number omitted). Failure to do so for 2 consecutive days will cause us to consider you unavailable for work or having resigned your position with our company. If you have found another job, or for another reason you will not be available to work, call also. Failure to do so may have a direct effect upon your benefits of future employment."

John Bazbaz testified that the letter was given to employees because the company did not have current phone numbers and addresses for the employees and that the layoff was intended to be temporary in nature. I do not believe that Respondent did not have this information, and even if it did not, it would have been far less cumbersome for the employees and far less costly for Respondent to take this information at the time of layoff rather than opting for the call-in requirement. I believe the more rational reason for the requirement, given the discriminatory motive for the layoff, was to find a way to permanently discharge employees and have a reason for not recalling them when production increased.[53] As I find that the requirement was made in

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[53] Luis Castro testified that he went back to the plant on January 31, to pick up his pay check. He was standing in a line of other employees waiting for their checks, when Bazbaz came up and told the group of employees that if they wanted to work that they should continue to call. According to Castro, Bazbaz then

furtherance of the discriminatory and unlawful layoff, I find that it too was intended to unlawfully discourage the employees from engaging in protected conduct and was thus made in violation of Section 8(a)(1) of the Act. The call in requirement was changed in March at the request of the Board. The change required the employee only to write in or call in saying they were interested in recall and giving their address and phone numbers.

F. Did Respondent Retaliate Against Witnesses Following the June Hearing?

The Complaint alleges that beginning during the hearing in this proceeding which was conducted in June, 1995 and continuing thereafter, Respondent has engaged in a pattern of retaliation against the witnesses who testified against it. The alleged retaliation took the form of illegal interrogations, threats, warnings, a discharge and a July 7 layoff of ten more employees.

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turned around and laughed, as if he were making fun of the employees. With respect to this incident Bazbaz testified that he did not laugh at the employees and simply told them to call in as he expected to get material at any time. I credit Castro's version of the event as no action taken by Respondent after the layoff evidences any intent to recall anyone. To the contrary, look again at the overtime granted those employees not laid off and the failure to recall laid off employees when employees quit post layoff.

1. Did Respondent Question Employees as to Their Testimony After Their Appearance at the Hearing?

Camilio Ramirez was recalled as a witness after his first visit to the stand on June 6. He testified that on June 7, he reported for work, and was met by supervisors Fernando Molina and Sergio Palacios. There was also a group of employees nearby waiting to leave work. Palacios asked him what had been said at this hearing. The witness pointed out that he could not talk about that as he had been sequestered. Molina said, "Your mommy told you not to say anything?" The witness did not answer. Instead, he asked the other employees if they had received a subpoena to testify. Palacios said that those things (subpoenas) were "cock-sucking." The witness said that is not correct. Palacios addressed the employees and said, "That if they didn't want to go to testify in Court, not to go; only to return the subpoena by mail." The witness responded to this bit of misinformation by saying, "No, Sergio, because if they do not appear in Court, the police are going to go after them to take them to testify." Palacios answered, "Those are just stupid things, unimportant things." Palacios also asked him who was involved with the Union at this time, the real leaders of the union. The witness told him Luis Castro and Lucio Aviles. Ramirez also contends that thereafter, his work schedule was reduced for a while.

Both Palacios and Molina answered "No" when asked whether they had a conversation with Camillo Ramirez on about June 6, 1995 about Ramirez's testimony in this proceeding. I have heretofore found that both supervisors gave less than credible testimony when they denied knowledge of the Union campaign prior to the layoff and thus their blanket denial of a number of unlawful conversations

and threats made against Union supporters pre-layoff. I find nothing which would require a different finding with regard to the credibility gap that exists in this incident. I credit Ramirez's testimony set about above and find that Respondent thus engaged in conduct in violation of Section 8(a)(4) and (1) of the Act.

2. Were Camilio Ramirez, William Rosales and Marco Posadas Warned or Otherwise Disciplined Because They Gave Testimony in This Case?

Camilio Ramirez, who appeared as a witness in this proceeding and gave testimony against Respondent returned to work after his testimony. A day or so after his testimony, he was he was working on a machine that compressed boxes and banded them with straps. One of the boxes came out of the machine with some straps broken. The forklift driver, William Rosales, who had also testified against Respondent, arrived to pick up the boxes and Ramirez warned him to be careful because of the broken straps. Javier Guerrero approached the two employees at this time and in an angry tone, told Ramirez that if he ever saw him talking again, he would receive a warning. According to Ramirez, Guerrero had never spoken to him like that before. There is no rule against employees talking at Respondent's facility and no explanation was offered for this outburst against Ramirez.

William Rosales testified that subsequent to this incident, he was given a written warning for talking with another witness, Marco Posadas, about a work related matter. He was operating a forklift and noticed some wires on the floor. He called to fellow employee Marco Posadas to pick up the wires so they did not become entangled in the wheels of

the forklift. Rosales had been told to be careful of just such occurrence by Javier Guerrero earlier. Posadas responded and while he was picking up the wires, Guerrero approached and angrily grabbed Rosales by his arm, telling Rosales he was going to be given a warning. Guerrero said that he had seen Rosales talking with Posadas six times. Rosales did not say anything to Guerrero, though he testified that this accusation was false. Respondent has no written work rules and Rosales testified that he had not been told of any prohibition against talking with fellow employees. Rosales testified that after Guerrero threatened him, he saw Guerrero go to Posadas and Rosales left the area. Later, about five to ten minutes before quitting time, Posadas came to him and told him that he, Posados, had been fired. Rosales received a written warning for this incident.

Posados corroborated Rosales testimony that he was asked by Rosales to pick up wire from the plant floor so Rosales could perform his work. He testified that Guerrero came up and asked why the employees were talking. Posadas testified that he wanted to explain, but Guerrero would not let him. Guerrero then said he was giving them a warning for talking. Five minutes later, supervisor Zepeda summoned Posadas and another employee Guadalupe Leal to the office. Guerrero gave him a written warning which Posadas would not sign because he did not believe it to be true. Guerrero then asked Leal to sign as a witness and Leal declined saying he had not seen what occurred. Guerrero then told Posadas to go home. Posadas asked for a letter to obtain unemployment compensation and Guerrero said he could not give it to him. It was 3 pm, the normal end of the shift, and Posadas punched out and left. Posadas contends he was fired because Guerrero said, "Leave. You don't work here any more."

With respect to the alleged termination of Posadas, Guerrero testified that Posadas was given a warning on June 14, but was not fired. In this regard, he testified he gave Posadas a warning, noting to him that counting the instant one, Posadas had accrued three warnings Guerrero told Posados that John Bazbaz was going to review the warnings. According to Guerrero, Posados then said he was quitting and leaving. Guerrero testified that he said Posados could leave as his shift was ending and that if there was something else to come from the incident, he would tell him the following day.

According to Posadas, when he arrived home about 5 pm, John Bazbaz called and said, "This is John Bazbaz, and I found out what happened. I want you to return to work tomorrow, like always." Posadas returned to work the next day and worked continuously until he was laid off on July 7. With respect to the alleged firing of Marco Posadas on June 14, Issac Bazbaz testified that he was present when John Bazbaz spoke with Posadas by telephone on that day. He testified that Posadas believed he had been terminated and John Bazbaz told him that he had not been dismissed, that he would talk further with him and to continue to work. John Bazbaz testified that he learned that Posadas had been warned and phoned him and told him that he understood that he had been given a warning. He told Posadas that he was to report to work the next day, and that after the trial, he would investigate the circumstances. According to Bazbaz, Posadas said, "Yes, sure, no problem."

I credit Posadas testimony about this incident and find that he was discharged by Guerrero. John Bazbaz did not call William Rosales who received a written warning to see if he was coming to work the next day. Unless Posadas had been

terminated there was no reason for Bazbaz to call him. I further find that the basis for Rosales' warning and Posadas' discharge was their testimony in this proceeding. There was no basis in either work rules or past practice shown by Respondent for taking the disciplinary action against the two employees and given its animus toward the Union. I find that the discipline was meted out in retaliation for their testimony.

3. Did Respondent Deny Employees Camilio Ramirez, Jose Melendez, Jesus Martines and William Rosales Their Normal Work Hours and/or Overtime Hours in Retaliation for Their Testimony?

Jesus Martines was recalled as a witness, having previously testified on June 9. After he finished testifying, he went to work. Upon arriving at the plant, his supervisor, German Robles, told him there was no work for him to do because the machine he operated was being repaired. The same situation had existed the day before he testified, but on that day, he was assigned to different work. When he was sent home, he gave Robles his phone number and was told that Respondent would call him when they needed him. He later was informed not to report to work until Monday, the 12th, although he had been scheduled to work Saturday the 10th. According to Martines, Cesar Portillo has been demoted from supervisor to washing machine operator. Portillo was allowed to continue working cleaning the washing machines on the days Martines was not.

Jose Melendez testified herein on June 7. At that time he was working as an extruder operator on the 3 pm to 11 pm shift. Upon his return to work following his testimony, a supervisor, Herman Robles, warned Melendez and about

seven or eight other employees beginning work not to talk with anyone. Melendez, on this day or the next, also saw his working time reduced. He had just punched in on his shift when Javier Guerrero told him to go home, that he was not being granted any more overtime and that a new work schedule was being prepared. The shift that Melendez was starting would be overtime, but was previously scheduled and had been the same for more than a month. Guerrero also told him that if it became necessary to call him to work, supervisor Molina had his phone number. He was also supposed to work the following day, but Guerrero told him not to report for work, they would call him if they needed him. On Saturday, he called to see if he would be needed and reached Augustine Garcia. Garcia told him he did not know if he was needed and to wait ten minutes while he checked with supervisor Molina. Molina came on the line and told him to wait another 20 minutes while he talked with Guerrero. Melendez hung up and called back about 20 minutes later, but no one answered. He tried again, but still could not get an answer and thus did not report to work. Melendez reported to work the following Monday and spoke with supervisor Augustine Garcia, who said he had attempted to reach Melendez on Saturday as he had work for him. Melendez said he was lying as he did not receive any calls Saturday. Melendez has a company beeper.

Melendez has not worked any overtime since he appeared as a witness in this case, though another operator performing the same function on the same shift continued to receive overtime. Additionally, the witnesses helper on the extruder was taken away from him on June 25. Melendez asked his supervisor German Robles why this was happening and Robles said he needed him somewhere else.

Prior to his testimony on June 7, William Rosales had been working nine to twelve hours a day. Since then, he works no overtime. He also had been allowed to work on his normal day off and that has been canceled. His work week has dropped from 55 to 60 hours a week to 48 hours a week. Rosales also testified that though his overtime was cut, other employees were allowed overtime. Rosales specifically mentioned another forklift operator as being an employee who continued to work overtime. Before Rosales first testified, he was told by a supervisor that he was working overtime because the Respondent did not have enough personnel. Rosales further testified that after his testimony, supervisors who had normally spoken to him would no longer do so. He noted in connection with the incident noted above wherein Guerrero warned Ramirez against speaking with other employees, that he had seen Guerrero speaking with Supervisor Molina shortly after the incident. Ramirez then testified that Molina came to him and said that he would not be needed to work on Saturdays. Saturday was one of his five regular work days.

Respondent offered no evidence in denial of these employees testimony and I credit their testimony, finding that their overtime hours and scheduled work days were cut by Respondent immediately after their testimony herein. As no business reason was offered by Respondent for these actions, I infer that they were in retaliation for the employees' testimony and in violation of Section 8(a)(1), (3) and (4) of the Act.

4. Did Respondent Tell an Employee That He Had Been Instructed to Make Things Hard on Him to Induce Him to Quit His Employment?

David Contreras testified on June 8 and was recalled as a witness. After his initial testimony, he returned to work and had a conversation with his supervisor Israel Zepeda regarding how many bags he was to produce on his machine. Zepeda told him that he had to improve on the record of the previous shift which had produced 18 bags. He told Zepeda to give him a helper and Zepeda said he would furnish one at 3 am, about four hours into the shift. There had been a helper on the earlier shift. He never got a helper on this shift and produced about 15 bags by himself. He went to Zepeda at 3 am and asked for his helper. Zepeda said he could not furnish one because he had orders from Javier Guerrero and from John Bazbaz to provoke him to quit for giving testimony against the Company. By the time of October hearing Zepeda had quit working for Respondent. Guerrero denied ever telling a supervisor to make things hard for an employee so that he would quit. Whether Guerrero actually told Zepeda to tell Contreras these things, I am not sure. However, I do believe Contreras testimony in this regard and find that Respondent has violated Section 8(a)(4) and (1) by Zepeda's actions.

5. Did John Bazbaz Threaten to Kill Camilio Ramirez

As noted above, Camillo Ramirez testified in early June and was thereafter subjected to certain harassment and loss of overtime. He also testified in the continued hearing that subsequent to his earlier testimony John Bazbaz threatened to kill him, apparently in retaliation for his earlier

testimony. In the main that testimony involved a conversation he had with Bazbaz in around April 1995. At that time, Ramirez had suffered an injury to his hand and was having difficulty performing his work. According to Ramirez, John Bazbaz came to him at work after the injury and asked him if he were tired. He explained to Bazbaz about the injury. Bazbaz told him to go to his office. At the office, Ramirez asked Bazbaz to help him because of the injury to his hand. Bazbaz told him not to worry about anything. The two men then talked about the Union. Bazbaz told him that the unions were no good, noting a company in Dallas that was unionized and all the workers were fired. According to Ramirez, Bazbaz told him that at one point there were a thousand employee members, but now there were only about a hundred. Bazbaz continued telling him that he had laid off the other employees because of lack of work, not because of the Union.

Ramirez commented that Aviles had told him that his fellow workers had earlier attempted to form a union to see if he would better their wages and receive benefits and were told by Bazbaz that they had no rights and the doors were open for anyone who wanted to leave. Bazbaz denied saying this and told him that Aviles was a guy that was not grateful because he was the electrical supervisor who should not have been involved with the Union. He added that he had given Aviles everything he needed. According to Ramirez, Bazbaz again told him that unions were no good and that there was no need for middle men. He added that if Ramirez had any problem, just come to him. Bazbaz then told him again not to worry about his hand, but that he wanted one small favor, to have the witness testify for the Company in court. Out of fear of being fired, the witness agreed. Bazbaz also asked him to keep this conversation a secret.

Bazbaz had a different version of this conversation. Bazbaz testified that Ramirez asked to speak with him privately. According to Bazbaz, Ramirez told him that he was a member of the Union and Bazbaz said he knew that. Ramirez then told Bazbaz of a medical problem he had with one of his hands. As Ramirez had a job requiring physical effort, Bazbaz was concerned that the injury was job related. So Bazbaz said he was sorry about the injury and not to worry. According to Bazbaz, Ramirez then told him that he had gone to the Union and told them of the injury and had been advised to return to the plant and fake a fall to explain the injury. Bazbaz asked if he would be willing to testify to this conversation with the Union and Ramirez said he would. Bazbaz subsequently paid for medical treatment for Ramirez's injury.

This conversation was not alleged in the Complaint as being unlawful. On brief, Charging Party and General Counsel assert that it should be found unlawful, and I agree to a degree. Crediting the testimony of Ramirez as set out above, I find that the conversation is coercive and demeaning of the Union, thus violative of Section 8(a)(1) of the Act. I do not find Ramirez's testimony about testifying on behalf of the Respondent in "court" sufficiently specific to justify a finding that Respondent was attempting to somehow bribe Ramirez into impeding Board processes or to offer untruthful testimony. It could well be that Bazbaz assertions in this regard are true. They are not contradictory of what Ramirez stated.

Camilio Ramirez was recalled as a witness at the October hearing and, according to Ramirez, about a week after his second appearance herein, he was working at about

9 or 10 in the morning when he was approached by John Bazbaz, who was alone. According to Ramirez, Bazbaz said, "Do you know, Mister,[54] I have not had a chance, but now that I have it, I am going to tell you. You are going to die, you son of a bitch. I am going to kill you." According to Ramirez, he responded by asking Bazbaz, "Are you threatening me, sir?" Bazbaz allegedly then said, "No, I am advising you, I am threatening you; I am telling you that you are going to die," again calling him a "son of a bitch." Bazbaz added, "You know what, I already forgave you once. Only God is missing, But not even God; Because for -- so that God may forgive you, I -- you have to be a good person." He also told me, You know what; Be very straight in the job because the most minor fault, that -- I am going to fire you." Ramirez testified that at this point, he was frightened and left work. He amended this to say that he left about two hours after his encounter with Bazbaz.

According to Ramirez, he spoke with Bazbaz again before leaving. Ramirez went to Bazbaz's office and asked to speak with Bazbaz. When Bazbaz appeared, Ramirez asked to speak with him privately. Bazbaz laughed and indicated that Ramirez should come into his office. He did so and found that present were Carlos Hallatt, Luiz Mendoza and Javier Guerrero. Ramirez told Bazbaz that whenever Bazbaz wanted to do what he had said that morning, he was at his disposal. Bazbaz laughingly said, "I don't know what you are talking

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[54] According to Rameriz, Bazbaz used the term "Maestro", which in Mexico is a term used to refer to person who perform the most menial tasks in society, and is a very derogatory term.

about. Ramirez responded, "No, sir," I said, "You do know what. You know what you told me this morning, that you were going to kill me." That, "You are going to die." Bazbaz laughingly said, "I don't know anything about that." Ramirez added that mocking him and laughing at him were the other three management members present. Ramirez testified that when he saw this, he told Bazbaz that he had only come to tell him that and he was leaving. Bazbaz said for him not to leave, that would be insubordination. Ramirez stood up and Bazbaz continued, complaining about the quality of Ramirez's work. Bazbaz told Ramirez to keep the place clean and do his work well. Bazbaz also complained that Ramirez would not fill out necessary paper work when he went to see a doctor. Bazbaz then referred Ramirez to Guerrero with regard to this paper work. Ramirez told Guerrero that no one had ever told him about any such paper work. Bazbaz interjected "If you didn't know it, now you know it. Ramirez ended the meeting by saying, "From now on, whenever I would go out, I would look for the paper and sign it, and, regarding the cleanliness of the place, all the time that I had a chance to clean, I would clean." Ramirez left, telling Bazbaz he had to leave because of an emergency involving Ramirez's wife. Supervisor Israel Zepeda had earlier told Ramirez that he had received a call from Ramirez's wife about the emergency.

Ramirez returned to work the next day after the alleged threat and continued to work until he was laid off some days later. Ramirez testified that he reported the incident to Lucio Aviles. He also testified that he wanted to report it to the police, but did not, for unexplained reasons. He also said he reported the incident to supervisor Augustine Garcia and told Union organizers Ricardo Medrano and Andy Garza about the threat. He gave a written statement to the

Union organizers about the incident in August, 1995, which was supplied to the Board in that month. Medrano testified that he learned of the alleged threat from Lucio Aviles. Aviles told Medrano that a death threat was made against Ramirez and that he was very scared and didn't know what to do. Medrano told Aviles to contact Ramirez and have him get in touch. Ramirez called him a couple of hours later Medrano could not remember what month in which these conversations occurred. According to Medrano, Ramirez told him that John Bazbaz had threatened him and threatened his life, and he was very scared; he didn't know what to do. Medrano testified Ramirez said he wanted to leave the company and just forget about the whole thing. Medrano then told Ramirez he needed to speak with the Union's attorneys and with the Board. Medrano relayed Ramirez's allegations to Andy Garza, Betty Boyer and attorney Janovsky.

Bazbaz testified he learned of the allegation that he had threatened Ramirez from his attorney at some point in early August. He also testified about the events of the day that Ramirez said the threat occurred, which was two or three weeks after Ramirez had testified in the first hearing. He testified that he and Javier Guerrero took a tour of the plant about 10 am on that day for about 15 minutes. They encountered Ramirez baling paper scrap and cardboard boxes. Bazbaz testified that he approached Ramirez and said good morning and told him to make sure that he did not scrap boxes that could be used again and Ramirez said it was no problem. He also told him to keep polypropylene scrap separate from the other scrap because of a difference in the price for the two types. According to Bazbaz, this was the end of the conversation and he and Guerrero continued through the plant and then returned to the office.

Guerrero testified about meeting with Ramirez in the morning. According to him, they encountered Ramirez on a tour of the plant and said hello. Bazbaz then told Ramirez to be careful with the boxes he was scrapping, and to ask his supervisor if he had any question. Bazbaz also told him to keep the work area clean in order to make it safe, noting that there could be an accident if someone walked where the scrap boxes were. Guerrero testified that Ramirez said okay, and Bazbaz and Guerrero left the area.

About two hours later, Luis Mendoza advised Bazbaz that Ramirez wanted to speak with him privately. According to Bazbaz, he was unwilling to do that because there was confusion about their previous conversation in April wherein Bazbaz was accused by Ramirez of trying to bribe him into testifying against the Union. Bazbaz told Ramirez to enter his office and he asked in three management witnesses, Mendoza, Hallatt and Guerrero. As they entered, Bazbaz asked Ramirez what he could do for him. Bazbaz testified that Ramirez said, "I am here for you to do what you were going to do to me. And I asked him, What are you talking about? He says, Well, you know what. Bazbaz said, No, I don't. Please explain." Suddenly Ramirez changed the subject, and said, "Well, you know, I got to go because I have an emergency and my wife called, and I need to go." Guerrero asked Ramirez to fill out a form excusing his leaving early and Ramirez nodded yes. Bazbaz told him in parting, "Look, Camilio, if you do your work -- if you come early to work, if you come on time to work, if you do your job as you should and you keep your area clean, you shouldn't have any problems in the plant." According to Bazbaz, Ramirez said yes. Ramirez returned to work the next day. Bazbaz testified that during the meeting the other three management members did not mock or laugh

at Ramirez, but remained quiet and listened. Guerrero, Hallatt and Mendoza gave essentially similar descriptions of this meeting. According to Guerrero, Bazbaz asked him what Ramirez had been talking about after Ramirez left.

I believe that Ramirez truthfully felt that Bazbaz had somehow threatened him in the morning. His opening comments at the afternoon meeting with the management officials, which all participants described similarly, support this finding. Given his treatment at the plant after his testimony in June, he can be excused for feelings of paranoia. On the other hand, I do not find that Bazbaz threatened to kill Ramirez or believed that he had threatened him physically in any fashion. Ramirez could easily had interpreted Bazbaz criticism of the way in which he was performing his work that morning to be a threat of some sort. Having observed John Bazbaz for almost a month of hearing, I do not believe he would either speak to an employee in a demeaning manner or threaten to cause them physical harm. Bazbaz is a very intelligent, soft spoken man who appeared to have a great deal of patience. Nothing in his demeanor would suggest he would lose his temper and threaten an employee as Ramirez alleges. Moreover, there is no explanation as to why this incident was not reported to the Board until over a month after its alleged occurrence. I do not credit Ramirez with regard to the alleged death threat and do credit Bazbaz's denial that such a threat was made.

6. Did the Respondent Unlawfully Lay off Employees on July 7, 1995?

On July 7, Respondent had a further layoff, this time laying off the ten employees named below:

Javier Garcia	William Rosales
Camilio Ramirez	Marco Posadas
Guadalupe Leal	Jose Melendez
Eliseo Serrano	Antonio Pivaral
David Contreras	Erick Hernandez

John and Issac Bazbaz testified that the decision to make the July layoff was prompted by continuing negative results and the outlook for the future. They testified that a decision was made to discontinue production of HDPE because it was not profitable. Ceasing this production line caused the layoff. John Bazbaz testified that the demand for polypropylene remained constant and the Company decided to concentrate its efforts in this market. Isaac Bazbaz testified that prior to this layoff, Respondent attempted to cut costs. The primary means used was to cease allocating administrative expenses from the parent corporation to the Respondent. It hired an administrative plant manager to perform some of the tasks that had been performed by the parent. This manager, Luis Mendoza, was also a potential investor in the Respondent, though he had not invested in the Company as of the date of his testimony herein. Subsequent to the layoff, Respondent did run some HDPE in order to meet the demands of customers for its large existing inventory of HDPE. According to Respondent, these customers were willing to buy some of the existing stock, but only if they were also offered some custom HDPE at the same time.

With respect to the July layoffs, John Bazbaz testified that he instructed Javier Guerrero to tell him how many people it would require to just run polypropylene production and then to select the employees to be laid off based upon the

criteria of attendance, tardiness, and skills.[55] The positions eliminated by elimination of the HDPE production were grinders, washers, one forklift operator and the janitor. According to John Bazbaz, the layoff has not resulted in additional overtime for the remaining employees. There have been occasions when overtime was granted because a weekend shift was necessitated by lack of material or a broken machine that made overtime necessary to meet the promised delivery date to a customer.

Guerrero testified that he was instructed by John Bazbaz to review attendance, skills and warnings to select the persons to be laid off. Records relating to attendance and warnings for three months preceding the layoff were looked at in making the selection decision Guerrero announced the layoff to the affected employees in two groups of five employees each. According to Guerrero, he told the employees that they did not have enough material, and that with respect to HDPE, that production would cease because the price was very unstable. He denies mentioning the Union in either of these discussions and denied that Union support played any part in the selection process.

Some of the affected employees had a different version of these layoff meetings. Jose Melendez testified that at the meeting at which he was laid off, Guerrero told the gathered employees that management had made an evaluation regarding warnings and tardiness, and based on that evaluation, had decided to lay off ten employees, including those at the

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[55] Isaac Bazbaz testified that these criteria were absenteeism, tardiness and warnings.

meeting. Melendez complained because he had been told by Guerrero in May that the employees retained after the January layoff should not worry because the ones retained at that point were the best employees. According to Melendez, Guerrero then said they were being laid off because of being involved with the Union. The only time Melendez had been tardy between the date of his testimony and the layoff was the day he testified. He gave notice that he would be late that day and was told that it was all right.

David Contreras was told he was being laid off in a meeting with fellow employees Erick Hernandez, and Antonio Piveral. According to Contreras, Guerrero told them that management had decided to lay off some employees because there was not much work. Guerrero said they had selected employees for layoff taking into consideration attendance, cooperation shown to the factory and warnings. Contreras asked if they were going to be recalled and Guerrero said maybe they would if there was work. Contreras was called back from layoff by Guerrero on a temporary basis and worked one week in August. Eric Hernandez was also recalled at the same time on the same basis.

Camillo Ramirez learned he was being laid off from supervisor Israel Zepeda, who allegedly told him that Javier Guerrero wanted to know why he had taken so long with the decision.[56] In any event, Ramirez was sent to the laboratory and laid off by Guerrero. In this meeting, Guerrero also laid

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[56] I presume this is meant to refer back to the conversation Rameriz had with Bazbaz in April when Bazbaz allegedly tried to get Rameriz to testify against the union.

off William Rosales, Marco Posadas, Guadalupe Leal and Javier Garcia. Guerrero told them that due to economic problems and the inability to get materials employees were being laid off to keep the Company alive. Guerrero said the employees had been selected for layoff because of warnings, absences and tardies. Garcia asked why he was being laid off because he had no warnings and had not been late or absent. Guerrero told him that the Company could not pay a person for just sweeping, which was Garcia's job. Leal asked why he was being laid off and Guerrero said it was for warnings.

Rosales testified that about three days before he was laid off on July 7, supervisors Fernando Molina, Israel Zepeda and Augustine Garcia asked him how much he paid a month for his car and how many monthly bills did he have. None of these supervisors explained why they wanted this information. Rosales speculated that it was connected somehow to the layoff. He was laid off on July 7 at quitting time. He was told on that date to report to Respondent's laboratory. When he arrived there he was met by Guerrero, who told him to wait until some other employees arrived. Shortly thereafter, he was joined by Marco Posadas, Guadalupe Leal, Javier Garcia, and supervisors Zepeda and Robles. Guerrero told the employees that because the work load was very slow, the company had decided to layoff employees and the gathered employees were in that group. Guerrero added that the laid off employees had warnings and faults, including absenteeism. Rosales testified that he had been late for work about five times in the period between his first testimony and the day of the layoff. He added that on those occasions he had called in to announce that he would be late and was not told by the supervisors to whom he spoke that he could suffer adverse consequences by being tardy.

Since the layoff, Respondent has hired back two employees on a temporary basis for a one week period, and hired back two on a permanent basis. According to Bazbaz, to select the persons recalled he instructed Guerrero to look first to the January layoff list and the employees on that list who had complied with its instruction to write a letter telling of their willingness to be recalled and giving their current address and phone number. Bazbaz testified that only two or three of the employees laid off in January had sent such a letter. He also told Guerrero to look at the second group of employees laid off if he could not find someone for recall from the January list. The employees recalled temporarily were David Contreras, and Erick Hernandez. The employees recalled permanently were Antonio Pivaral, Guadalupe Leal, and Erick Hernandez. Hernandez quit a few days after being recalled. Although Respondent had the names and phone numbers of most, if not all, of the employees laid off in January, it did not call these people to see if they wanted to return to work. Instead, it only called those who had complied with its directive to write in acknowledging such a desire. Subsequent to the July layoff, Respondent's chemical engineer, Ivanoff, and a clerical, Denise Bardon, were laid off and supervisor Zepeda quit.

As of the date of the second hearing, Respondent employed about 20 production employees and about 30 some odd employees overall. The company is currently running three shifts four to six days a week. Hallatt remains employed as a consultant and he testified that the company has continued to try to automate more of its processes and noted that since the last hearing it has built cranes and modified conveyors that simplify the labor needed. It has also increased the productivity of the machines.

I am not convinced that the July layoff or the selection process used was discriminatorily motivated as was the January layoff and the January selection process. Only one of the employees laid off testified that the Union was mentioned as a reason for laying off employees. Other employees laid off at that meeting did not corroborate this testimony. Moreover, Respondent's reasons for the layoff ring true given the state of the market for HDPE. The employees laid off did not include non card signers, but the group was also not limited to witnesses in the prior hearing. Some of the actions taken subsequent to the July layoff for once support Respondent's economic defense, primarily the laying off of Ivanoff, who was needed only to consult on HDPE production. Respondent's reasons for reinstating some limited HDPE production post-layoff also seem reasonable. The timing of this layoff is also consistent with market conditions as described by expert witness Kopulsky whereas the timing of the January layoff was not. In all, I find that though Respondent clearly harbors union animus, and had knowledge of the laid off employees' union sympathies, it conducted the July layoff for legitimate economic reasons.

G. Is a Bargaining Order a Proper Remedy in this Case?

In *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court approved bargaining order remedies for "outrageous" and "pervasive" unfair labor practices, even without a showing that the union involved ever possessed evidence that it was the majority representative of the unit of employees who have been affected by such unfair labor practices. At 614-615, above, the Court also approved the use of bargaining order remedies in a second category of cases that it described as:

> "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy, in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practice and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment once expressed through (authorization) cards, would, on balance, be better protected by a bargaining order, then such an order should issue."

I believe a bargaining order remedy is warranted in this case under either category of cases established by the Supreme Court. Regarding the first category, the Second Circuit explained:

> "Certain violations have been regularly regarded by the Board and the courts as highly coercive. These are the so-called "hallmark" violations and their presence will support the issuance of a bargaining order unless some significant mitigating circumstance exists. They include such employer misbehavior as the closing of a plant or threats of plant closure or loss of employment, the grant of benefits to employees, or the reassignment, demotion or discharge of union adherents in violation of Section 8(a)(3) of the Act. "[57]

In the instant case Respondent by threatening employees with layoff, discharge and other, unspecified reprisals for supporting the Union, and then following up the threat with a layoff of almost 50 percent of the workforce, including only Union supporters, certainly has committed a "hallmark" violation.[58] It has followed the January layoff with further acts of reprisal against known Union supporters and against those who testified in the first hearing, as set out above. Under the circumstances the chances of securing a fair election at Respondent's facility are nil in my opinion. However, even if these violations are considered by some

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[57] *N.L.R.B. v. Jamaica Towing Co.*, 632 F.2d 208, 212, (C.A. 2, 1980).

[58] *See Great Chinese Am. Sewing Co. v. N.L.R.B.*, 578 F.2d 251 (C.A. 9, 1978); *Townhouse TV & Appliances,* 213 N.L.R.B. 716 (1974); *N.L.R.B. v. Gordon,* 792 F.2d 29, (C.A.2), *cert. denied* 479 U.S. 931 (1986); *Bandag, Inc. v. N.L.R.B.*, 583 F.2d 765 (C.A. 5, 1978).

appellate body to not fall into the so-called "hallmark" category, a bargaining order should issue as the facts of this case certainly fall into the second category of cases in which the Supreme Court has found the bargaining order remedy proper.

1. The Union Secured Authorization Cards From a Large Majority of Respondent's Non-Supervisory Employees.

General Counsel Exhibit 2, 1-58 represents the Union authorizations cards relied upon to demonstrate majority status at all relevant times in this case.[59] All of these cards were signed before the layoff in January 1995. During the course of the proceeding, the following cards were offered and received into evidence: 1, 3, 4, 6, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, and 58, (48 cards out of a unit of 64 employees. The cards were authenticated in four ways; (1) the 16 people who attended the January 18, union meeting and the testimony of Andy Garza, (2) the testimony of persons who witnessed the signing of the card, such as Lucio Aviles and Luis Castro, (3) the testimony of the card signer, and (4) comparison of samples of cardsigners handwriting and the signatures appearing on the cards.

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[59] With regard to the question of a appropriate unit, John Bazbaz testified that employees who occupied positions such as operators, helpers, forklift drivers, mechanics and electricians should vote in an election. Generically, that type of person is a production and maintenance person. Excluded from the unit are all other employees and supervisors as defined in the Act.

The cards are printed in both English and Spanish and clearly state that their purpose is to secure Union representation, and additionally, Union membership. There is no evidence that the cards were represented to potential signers as being solely for the purpose of securing an election. To the contrary, at a meeting held by the Union on January 18 where a large number of these cards were signed, Allen Dawson, the regional director of organizing for the ILGWU spoke to the employees. Dawson told the employees that signing the card was for the purpose of becoming a Union member and to allow the person to be represented by the Union. He instructed them that the person acting as a witness should make sure the signer read the card and understood it. Dawson was asked by an employee if he would have to pay union dues after signing the card. Dawson answered that dues did not have to be paid until the employees had a contract with Respondent. Dawson said the card could be used to obtain recognition from the Company, and that if recognition was not given, then there would be an election. No promises were made by the Union representatives at this meeting to induce employees to sign cards. I can find no credible evidence that any promises were made to secure the signing of any card admitted into evidence.

All of the card signers who were also currently working for Respondent at the time of their testimony were asked "Did you know or are you aware of any news reports that officers of the International Ladies Garment Workers Union were accused by the U.S. Government of taking bribes?" None of the witnesses were so aware. The following employees testified that they signed their authorization cards after having read and understood them and additionally testified that they were not promised anything as an

inducement to sign the cards: Marco Antonio Posadas (46), Alejandro Blasio (11), Julio Rodriqeuz (51), William Rosales (54), Nery Mendoza (35), Camilio Ramirez (47), German Eli Joya (29), Lucio Aviles (7), Javier Garcia (23), Luis Castro (16), Mario Perez (43), Jorge Aguilar (3), Jose Melendez (33), Jose Giron (24), Juan Torres (57), Felix Jove Palacios (41), Bethuel Montes de Oca Mendoza (38), Jose Americo Rosales (53), Rudolfo Bocanegra (12), Luis Napoleon Martines (32), Hugo Benavides (10), Godfredo Reyna (50), Clemente Garcia (21), David Arroldo Contreras (18), Erick Ricardo Hernandez Estrada (27), Subrino Guerra (26), Jesus Martines (31), Leonel Campoverde (14), Nicolas Chajon (17), Jose Ascensio (6), Manuel Perez (42), Efrain Villatoro (58), Guadalupe Leal (30), Oscar Godinez (?25), Pedro Antonio Molgar (34), Eliseo Moises Serrano (56),[60] Nelson Rodriquez (52).[61] The card signed by Antonio A. Calderon (13), was

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[60] On cross examination, Serrano testified that he was promised certain benefits as a member of the union. Specifically, he testified that "The benefits that I have been told about are those for which we are fighting. The benefits we don't enjoy as workers are those for which we want to be with the union." "[And I] would repeat again, if they tell you or they talk to you about joining an organization where it is because we are going to enjoy some benefits, on the contrary I would not sign." Serrano later explained that he was speaking about what Union organizer Medrano had told him. He said Medrano talked about the union wanting to represent him, that the union would try to get a contract, that the Union would try in negotiations to get benefits. Medrano said that the benefits the Union would try to get were vacation, holidays, and health insurance.

[61] Rodriquez on cross examination testified that Lucio Aviles promised him something with respect to wages and paid

withdrawn as the individual signed the English language side of the card and cannot read English.

I also compared the signatures on a group of cards with other records showing individual's signatures. By this method, I found the following cards to be authenticated: 4, 19, 28, 48, and 49. The remaining five cards admitted into evidence were authenticated by the person witnessing the signing.

The Union made a written request for recognition in May 1995 and it was refused by Respondent. Despite the showing of overwhelming support at the hearing in this proceeding, Respondent continues to refuse to recognize the Union. Further, It's efforts to stifle support may be having the desired effect on those employees who remain employed by it. The Union representatives testified credibly that attempts to contact employees who had signed authorization cards and who were still employed met with resistance. These employees would not talk with them on the phone and would not let them in their places of residence. Medrano characterized the campaign as dead following the layoffs. The filing of charges with the Board revived the campaign to an extent, but not nearly to the level before the layoffs. The Union has been unable to secure the signing of cards from present employees of Respondent since the layoff.

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vacation if he supported the Union. Clarifying his answer, he testified that he was promised the Union would bargain for increased wages and benefits. He further testified that Aviles told him the Union would try to get these thing. No one guaranteed him that these things could be achieved.

Respondent asserts in its defense against the issuance of a bargaining order that such an order is not permissible because the ILGWU merged with the Amalgamated Clothing and Textile Workers Union on July 1, 1995 after a vote of the membership taken in June, 1995. These dates are of course after the commission of most of the unfair labor practices found herein and after the demand for recognition made by the Union. With regard to this defense, the key issue for determination is whether UNITE is a new representative of the employees of Respondent, or only a continuation of the incumbent ILGWU. Case law demonstrates that if a post-merger entity is found to be a continuation of the prior representative, then continuity of representation exists and due process will permit the new entity to represent bargaining unit employees In *Western Commercial Transport,* 288 N.L.R.B. 214, the Board enunciated a 4-part test for determining whether continuity of representation exists.

(a) Continued leadership responsibilities by the existing union officials;

(b) Perpetuation of membership rights and duties, such as membership eligibility and dues structure;

(c) Continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated, and

(d) Preservation of the certified union's physical facilities, books, and assets.

Catherine Waelder is the Associate General Counsel for the ILGWU. She sponsored Respondent's exhibit no. 24,

with attachments A and B. The exhibit is the Merger Agreement between the ILGWU and the Amalgamated Clothing and Textile Workers Union. Exhibit A, is the constitution for UNITE; and Exhibit B, is described as, "Certificate of Consolidation of International Ladies Garment Workers Union and Amalgamated Clothing and Textile Workers Union" The Merger Agreement was signed by the presidents, general secretary, treasurer and executive vice presidents for each union, the International Ladies Garment Workers Union, and also, the Amalgamated Clothing and Textile Workers Union, on February 16, 1995.

Waelder described the merger as a consolidation and a continuation of two proud unions going forward as a new entity. There will be some ways in which the International Ladies Garment Workers Union does continue. It is not being dissolved or terminated, and that is reflected in the merger agreement. When the merger agreement is approved by the membership of the involved unions, effective July 1, then all members of the constituent unions will become members of UNITE. After the merger, inter alia, the ACTWU secretary and treasurer will become the secretary/treasurer of UNITE and thus, the secretary/treasurer of the ILGWU will no longer serve in that capacity. There will be a consolidation of the executive vice presidents of each consolidated union. The executive vice presidents for the newly-formed union will be double the size of the presently existing slate of vice presidents for either union. Over time, they will endeavor to reduce the number of vice presidents. The existing constitutions for the ILGWU and ACTWU will only remain in force and effect to the extent that they are not inconsistent with the new constitution of UNITE.

The members of the two consolidating unions becoming members of UNITE. Members of the constituent union shall be deemed members of UNITE without the payment of initiation fees or membership fees. However, new members that are gained after the date of the merger will be charged an initiation fee, depending upon the situation. In the context of an organizing campaign, frequently, there are no initiation dues.[62] It is up to the regions as to whether an initiation fee will be charged once UNITE is formed. The international president, with the approval of the GEB, has the power to set the amount or waive the payment of initiation fees by locals formed after June 30, or where special circumstances so require.

Respondents Ex. 24 will be deemed an amendment to and a substitution for the separate constitutions of the ILGWU and ACTWU. The membership of the constituent unions have been advised of the proposed merger in several ways, including articles in the last several issues of the union's newspaper, Justice, which goes to every member, as well as to delegates, talking about the upcoming merger vote and providing information about the merger, answering questions and providing answers. There was also a package of information sent to all the delegates to the convention, with a cover letter, including the delegates' merger guide, the merger agreement and the UNITE constitution. ILGWU President Mazur and, perhaps, other senior officials of the union have been traveling around the country and have been

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[62] Union Representative Betty Boyer testified the involved employees of Respondent would not be charged an initiation fee.

meeting with staff and members and answering questions about the merger.

Subsequent to the merger, there will be no change in the personnel who would represent a unit of ILGWU members in Houston, Texas, whether the representation is by a local or a district council. District councils, locals, joint boards, their staffs, their offices continue unchanged post merger. The staffs of the internationals will be merged. Affiliates are separate, autonomous labor organizations affiliated with the ILGWU or the Amalgamated. Assuming the merger goes through, post merger, they become affiliates of UNITE. Affiliates are independent entities, but governed by the constitution of the organization with which they are affiliated. The operations of an affiliate are not changed by the merger.

A district council is an affiliated union in the ILGWU. It has local unions, district councils, joint councils and joint boards. All of those are affiliated labor organizations. There will be no change in the district council, post merger. Those officers who were elected by the members or the constituent organizations of an affiliated union remain the same. There will be some changes for some locals in the dues structure, not for all of them. The minimum dues are going up, by the UNITE constitution, to $ 17 a month, which is the current monthly dues for the involved district council, so for them, there would be no increase.

The merger agreement provides that UNITE shall encourage internal mergers and consolidations of affiliate regions, departments and the Canadian conferences as quickly as possible. This however is a voluntary decision of the

affected affiliates. Internal mergers and consolidations shall require the approval, not just of the GEB, but also of the executive boards or board of directors of the affected affiliates. This provision survives the expiration of the merger agreement. This means affected affiliatesnever have to merge with another affiliate unless they choose to do so.

There will be no substantive changes in procedures mandated by the merger that the district council uses in dealing with units of members under its jurisdiction. Prior to the merger the ILGWU had provisions governing the way district councils are run, and also had provisions governing the way joint boards were run. It had a provision that said that, in the absence of a constitution, and most district councils do not have their own constitution, district councils would run in the same fashion as a joint board. The UNITE constitution followed the Amalgamated provisions on how the joint boards would be governed because they have far more joint boards than the ILGWU does. However that is not true for ILGWU's district councils because it has more district councils than Amalgamated does. So what was in the joint board section of the ILGWU's constitution was put it into the district council section of the UNITE constitution, which means that, where it used to be a cross-reference, now it is right there, spelled out in text for how a district council runs. It is substantively the same.

The involved district council is serviced by the central states region of the ILGWU. The central states region is an administrative arm of the union, not an affiliated labor organization. It is governed by the language encouraging mergers of regions. But nothing happens without consent. So

post merger, without speculation, no immediate change will occur, and, perhaps, no change indefinitely.

All applicants for membership shall complete and sign an application form of the local or of UNITE. If employees of Respondent become members of the Union, they will be members of UNITE and a member of the district council that exists today as a part of the ILGWU. The Union resulting from the merger will be more than double the size of the present ILGWU membership. The present approximate membership in the ILGWU is approximately 160,000 members. The resulting membership in UNITE following the merger will be approximately 350,000 active members.

Assuming that the ILGWU entity that has been involved with USA Polymer employees has bargaining rights, post-merger, they continue as they did before with the same staff, the same elected leaders, the same business agents and personnel. There are two provisions in the merger agreement that speak to local affiliates. One of them is Section 5, entitled, "Local Unions and Other Chartered Bodies, on page 14. Section A(2) of Section 5, the specific statement that, "Current officers of the affiliates of either constituent union shall, upon the effective date of the merger, continue to serve in their elected capacities. Beginning at page 24, and running on for a few pages, there is a Section 10 entitled, "Rights and Obligations of UNITE and the Constituent Unions." Paragraph C on this point, in Paragraph C(1), the document explicitly provides that, "The merger of the ILGWU and the ACTWU shall not affect, interrupt or change in any way the continuing status or the rights and duties with respect to third persons of either the ILGWU or the ACTWU or their affiliates," which includes the Texas/Oklahoma/Arkansas

district council, which is an affiliate. This includes, but is not limited to recognition agreements and collective bargaining agreements or the continuity or renewal thereof. The agreement specifically provides that the merger does not interrupt the status or the rights and duties of the parties with respect to negotiation of agreements.

Waelder testified that post-merger, there is no need to secure new authorization cards. Members of the ILGWU and members of the Amalgamated will become, automatically, members of UNITE, without filling out any new documents to make that happen.

I find that the testimony and exhibits presented through Ms. Waelder clearly established the criteria set out by the Board and demonstrates continuity of representation. The fact that the employees of Respondent did not vote in the delegate convention that resulted in the merger of the ILGWU and ACTWU is irrelevant. In *NLRB v. Financial Institution Employees,* 106 S. Ct. 1007, (1986), the Supreme Court held that the Act does not require that non-members be permitted to vote in union affiliation elections. In the case of *American National Insurance Company,* 124 L.R.R.M. 1116, (1986), that Court found that a union's exclusion of non-member unit employees from a merger vote does not preclude finding a violation of the Act based on respondent employer's refusal to recognize and bargain with a newly merged entity, precisely because continuity of identity between the pre-merger and the post-merger bargaining representatives was established. Thus, I find that UNITE, through its continuity of identity with the ILGWU, has the authority to bargain on behalf of Respondent's unit employees.

In conclusion, I find, for the reasons stated above, that the merger does not offer any impediment to the issuance of a proper bargaining order and I will recommend that a bargaining order issue in this proceeding.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The employees of Respondent falling into the unit described below for a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All production and maintenance employees, including operators, helpers, forklift operators, packers, mechanics and electricians, and excluding all other employees, supervisors and guards as defined in the Act.

4. Respondent has violated Section 8(a)(1) of the Act by the actions of its supervisors and agents during the months of September, October, November and December, 1994 and January, 1995, at its facility, by:

(a). Coercively interrogating employees about their union sympathies and activities, and the union sympathies and activities of fellow employees.

(b). Threatening employees with more onerous working conditions, physical harm, layoff, discharge, and other, unspecified reprisals, for engaging in union or other protected concerted activities.

(c) Creating the impression of surveillance and subjecting employees to surveillance because of their union or other protected converted activities.

(d) Promising employees a bonus or other reward for not supporting the Union or engaging in other union or protected concerted activities.

5. Respondent has violated Section 8(a)(3) and (1) of the Act by:

(a) Commencing on or about January 27, 1995 and continuing until on or about January 30, 1995, permanently laying off the employees named below because they engaged in union or other protected concerted activities and to discourage them and other employees from supporting the Union or engaging in other concerted protected activity:

Miguel Alanis	Mario Aparicio
Lucio Aviles	Hugo Benavides
Alejandro Blasio	Rodolfo Bocanegro
Edgar Gerardo Carrera	Luis Castro
Nicholas Chajon	Elias Escobar
Julio Hector Garcia	Jose Giron
Oscar Godines	German Joya
Luis Martines	Pedro Molgar
Nery Mendoza	Miguel Molina
Bethuel Montes De Oca	Mauro Moran

Walter Jose Orellana	Felix Jovel Palacios
Manuel Perez	Miquel Angel Molina
Mario Perez	Nelson Rodriquez
Jose Rosales	Lionel Campoverde
Noe Ramirez	

(b) Selecting the above named employees for permanent layoff because they supported the Union or engaged in other protected concerted activities.

(c) Eliminating the job classification of electrician to avoid rehiring its discharged electrician, Luis Aviles, because he supported the Union and engaged in union or other protected concerted activities.

6. Respondent has violated Section 8(a)(1) of the Act by issuing employees being laid off in January 1995 a letter requiring them to call in on a daily basis or risk losing their right to recall or termination, because they supported the Union or engaged in other protected concerted activities.

7. Respondent has violated Section 8(a)(4) and (1) of the Act by:

(a) John Bazbaz coercively interrogating employees about their Union support and demeaning the Union in April, 1995.

(b) Verbally warning employees not to talk with other employees or threatening employees with unspecified reprisals because they gave testimony in a Board hearing contrary to the interests of Respondent.

(c) Interrogating employees about their testimony given in a Board proceeding and advising employees to ignore Board issued subpoenas.

8. Respondent has violated Section 8(a)(4), (3) and (1) of the Act by:

(a) Reducing the working hours of employees and withholding overtime work to employees because they gave testimony in a Board hearing and because they support the Union or otherwise engaged in protected concerted activity.

(b) Imposing more onerous working conditions on employees in an attempt to induce them to quit their employment because they gave testimony in a Board proceeding, supported the Union and engaged in other protected concerted activity.

(c) Issued written warnings to employees and discharged employees because they gave testimony in a Board proceeding and supported the Union or engaged in other protected concerted activity.

9. Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the collective bargaining representative of its employees in the above defined unit.

10. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[63]

The Respondent having discriminatorily discharged the employees who are named in paragraph 5(a) above, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.* 90 N.L.R.B. 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 N.L.R.B. 1173 (1987).[64] Similarly, Respondent unlawfully retaliated

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[63] I have found that Respondent unlawfully imposed a call-in requirement on laid off employees. Respondent voluntarily rescinded this requirement prior to hearing and thus no affirmative action is necessary to remedy this violation.

[64] Respondent discriminatorily discharged its employee Marco Posadas, but immediately remedied this action from the standpoint of backpay liability by reinstating him before any loss of earning occurred. As I found in a preceding section of this decision, a layoff among unit employees would have occurred for legitimate reasons at some point after January, 1995 and before June 1995, affecting an uncertain number of employees. The evidence adduced in this record is insufficient to determine the legitimate date of such a layoff and the number and identity of those employees who would be affected by such a layoff. It will be left to the compliance stage of this proceeding to make these determinations.

against employees William Rosales, Camilio Ramirez, Jose Melendez and Jesus Martines by denying them scheduled working hours and/or overtime hours. It must make these employees whole for lost earnings as a result of its unlawful actions in the manner set out immediately above.

Reinstate the position of electrician at its facility and offer Luis Aviles restatement to this position in addition to the actions set out in the paragraph above.

Rescind the written warnings given to William Rosales and Marco Posadas, remove any record of such warnings from their personnel files, and inform them in writing that this has been done and that such warnings will not be used against them in any way.

Respondent has unlawfully withheld recognition from the Union and has refused to bargain with Union, therefore, Respondent should be Ordered to, upon request of the Union, extend recognition to it as the collective bargaining representative of the Respondent's employees in the unit found appropriate, and to bargain in good faith with the Union over the hours, wages and other working conditions of unit employees and if agreement is reached, embody such agreement in a written collective bargaining agreement.

Because of the serious nature of the violations committed by Respondent and because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other

manner on rights guaranteed employees by *Section 7 of the Act. Hickmott Foods*, 242 N.L.R.B. 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [65]

ORDER

The Respondent, U.S.A. Polymer Corporation, Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union sympathies and activities, and the sympathies and activities of fellow employees and demeaning the Union in coercive conversations with employees.

(b) Threatening employees with more onerous working conditions, physical harm, layoff, discharge, and other, unspecified reprisals, for engaging in union or other protected concerted activities.

(c) Creating the impression of surveillance or subjecting employees to surveillance because of their union or other protected converted activities.

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[65] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Promising employees a bonus or other reward for not supporting the Union or engaging other union or protected concerted activities.

(e) Permanently laying off the employees because they engaged in union or other protected concerted activities and to discourage them and other employees from supporting the Union or engaging in other concerted protected activity.

(f) Selecting the employees for permanent layoff because they supported the Union or engaged in other protected concerted activities.

(g) Eliminating the job classification of electrician to avoid rehiring its discharged electrician because he supported the Union and engaged in Union or other protected concerted activities.

(h) Verbally warning employees not to talk with other employees or threatening employees with unspecified reprisals because they gave testimony in a Board hearing contrary to the interests of Respondent.

(i) Interrogating employees about their testimony given in a Board proceeding and advising employees to ignore Board issued subpoenas.

(j) Reducing the working hours of employees and withholding overtime work to employees because they gave testimony in a Board hearing and because they support the Union or otherwise engaged in protected concerted activity.

(k) Imposing more onerous working conditions on employees in an attempt to induce them to quit their employment because they gave testimony in a Board proceeding, supported the Union and engaged in other protected concerted activity.

(l). Issuing written warnings to employees and discharging employees because they gave testimony in a Board proceeding and supported the Union or engaged in other protected concerted activity.

(m) Refusing to recognize and bargain with the Union as the collective bargaining representative of its employees in the unit found appropriate herein.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, including operators, helpers, forklift operators, packers, mechanics and electricians, and excluding all other employees, supervisors, and guards as defined in the Act.

(b) Offer the employees named below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

Miguel Alanis
Lucio Aviles
Alejandro Blasio
Edgar Gerardo Carrera
Nicholas Chajon
Julio Hector Garcia
Oscar Godines
Luis Martines
Nery Mendoza
Bethuel Montes De Oca
Walter Jose Orellana
Manuel Perez
Mario Perez
Jose Rosales
Noe Ramirez
Mario Aparicio
Hugo Benavides
Rodolfo Bocanegro
Luis Castro
Elias Escobar
Jose Giron
German Joya
Pedro Molgar
Miguel Molina
Mauro Moran
Felix Jovel Palacios
Miquel Angel Molina
Nelson Rodriquez
Lionel Campoverde

(c) Make whole William Rosales, Camilio Ramirez, Jose Melendez and Jesus Martines for the unlawful denial of their scheduled working hours and/or overtime hours in the manner specified in the remedy section of the decision.

(d) Rescind the written warnings given to William Rosales and Marco Posadas, remove any record of such warnings from their personnel files, and inform them in

writing that this has been done and that such warnings will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Houston, Texas, copies of the attached notice in both English and Spanish marked "Appendix."[66] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[66] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" Shall Read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C., March 25, 1996
Wallace H. Nations, Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees about their union sympathies and activities and the union sympathies and activities of fellow employees and demean the Union in coercive conversations with employees.

WE WILL NOT threaten employees with more onerous working conditions, physical harm, layoff, discharge, and other, unspecified reprisals, for engaging in union or other protected concerted activities.

WE WILL NOT create the impression of surveillance or subject employees to surveillance because of their union or other protected converted activities.

WE WILL NOT promise employees a bonus or other reward for not supporting the Union or engaging other union or protected concerted activities.

WE WILL NOT permanently lay off the employees because they engaged in union or other protected concerted activities and to discourage them and other employees from supporting the Union or engaging in other concerted protected activity.

WE WILL NOT select employees for permanent layoff because they supported the Union or engaged in other protected concerted activities.

WE WILL NOT eliminate the job classification of electrician to avoid rehiring our discharged electrician because he supported the Union and engaged in Union or other protected concerted activities.

WE WILL NOT verbally warn employees not to talk with other employees or threaten employees with unspecified reprisals because they gave testimony in a National Labor Relations Board hearing.

WE WILL NOT interrogate employees about their testimony given in a National Labor Relations Board proceeding and advise employees to ignore Board issued subpoenas.

WE WILL NOT reduce the working hours of employees and withhold overtime work to employees because they gave testimony in a National Labor Relations Board hearing and because they support the Union or otherwise engaged in protected concerted activity.

WE WILL NOT impose more onerous working conditions on employees in an attempt to induce them to quit their employment because they gave testimony in a National Labor Relations Board proceeding, supported the Union and engaged in other protected concerted activity.

WE WILL NOT issue written warnings to employees and discharge employees because they gave testimony in a National Labor Relations Board proceeding and supported the Union or engaged in other protected concerted activity.

WE WILL NOT refuse to recognize and bargain with the Union as the collective bargaining representative of our employees in the unit found appropriate.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production and maintenance employees, including operators, helpers, forklift operators,

packers, mechanics and electricians, and excluding all other employees, supervisors, and guards as defined in the Act.

WE WILL offer the employees named below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

Miguel Alanis
Lucio Aviles
Alejandro Blasio
Edgar Gerardo Carrera
Nicholas Chajon
Julio Hector Garcia
Oscar Godines
Luis Martines
Nery Mendoza
Bethuel Montes De Oca
Walter Jose Orellana
Manuel Perez
Mario Perez
Jose Rosales
Noe Ramirez
Mario Aparicio
Hugo Benavides
Rodolfo Bocanegro
Luis Castro
Elias Escobar
Jose Giron
German Joya
Pedro Molgar
Miguel Molina
Mauro Moran
Felix Jovel Palacios
Miquel Angel Molina
Nelson Rodriquez
Lionel Campoverde

WE WILL Make whole William Rosales, Camilio Ramirez, Jose Melendez and Jesus Martines for the unlawful denial of their scheduled working hours and/or overtime hours, with interest.

WE WILL rescind the written warnings given to William Rosales and Marco Posadas, remove such warnings from their personnel files and inform them in writing that this has been done and that such warnings will not be used against them in any way.

USA POLYMER CORPORATION

APPENDIX D

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Region Sixteen

Cases 16-CA-17455 and 16-CA-17189

[Dated September 24, 1999]

USA POLYMER CORP.	)
	)
and	)
	)
TEXAS-OKLAHOMA-ARKANSAS DISTRICT COUNCIL, UNITE a/w UNION OF NEEDLE TRADES, INDUSTRIAL & TEXTILE EMPLOYEES)	)
	)
CONSOLIDATED WITH	)
	)
USA POLYMER CORP.	)
	)
and	)
	)
TEXAS-OKLAHOMA-ARKANSAS DISTRICT COUNCIL, ILGWU a/w INTERNATIONAL LADIES' GARMENT WORKERS UNION	)

USA POLYMER CORPORATION'S MOTION FOR RECONSIDERATION, FOR REOPENING THE RECORD AND FOR REHEARING

Pursuant to §102.48(d)(1) of the National Labor Board Rules and Regulation, USA Polymers Corporation ("USA Polymer") files this Motion for Reconsideration, and to Reopen the Record to introduce new evidence that establishes that issuance of the bargaining order is inappropriate in the present action, and states as follows:

Procedural History

The NLRB, acting on the request of the Texas-Oklahoma-Arkansas District Counsel, ILGWU a/w International Ladies' Garment Workers Union ("ILGWU"), brought charges against USA Polymer.[1] This case was heard before an Administrative Law Judge in Houston, Texas from June 5, 1995 through June 21, 1995. A second hearing was held on October 17 through October 18, 1995.

On March 25, 1996, Administrative Law Judge Wallace H. Nations issued a decision. USA Polymer timely filed exceptions to that decision. On August 24, 1999, the Board issued a Decision and Order. Among the holdings of the Board, USA Polymer was ordered to bargaining with

---

[1] While this action was pending, ILGWU was in the process of merging with the Amalgamated Clothing and Textile Workers ("ACTWU") to form the Union of Needle Trades, Industrial and Textile Employees ("UNITE"). The present action was merged with Cases 16-CA-17455, which involved UNITE as a charging party against USA Polymer.

UNITE as the duly designated representative of the employees. Due to facts that have come into existence since the most recent hearing in this case that requires a different disposition, USA Polymer now files this Motion for Reconsideration and to Reopen the Record or for Rehearing.

Summary of Argument

In light of new evidence that has come into existence since the evidentiary record was closed in this case, a bargaining order is an entirely inappropriate remedy for, at least, the following reasons. First, due to economic conditions and through normal attrition, the workforce at USA Polymer has experienced 672% turnover since the alleged unfair labor practices. Second, there has been a more than a four and one half year delay between the alleged unfair labor practices and the issuance of the bargaining order by the Board. This passage of this amount of time has erased any lingering effects that would prevent the holding of an election, the remedy preferred over the issuance of a bargaining order. Third, the bargaining order was based on the assumption that the impending merger between ILGWU and ACTWU would result in continuity of representation, such that requiring USA Polymer to bargain with UNITE would accurately reflect the desire of employees in 1995. An extraordinary remedy such as a bargaining order should not be based upon mere assumption. New evidence should be allowed to ascertain whether these assumptions have actually proven true during the merger process between the two unions. In light of these developments, it would be improper to require USA Polymer to bargain with UNITE at this time.

I. New Evidence Presented for Reconsideration Reopening and Rehearing.

USA Polymer moves to introduce the following evidence, as attached in Exhibit A, which establishes that a bargaining order is improper in the current action:

- At the start of 1995, the number of employees was approximately 66.

- Since 1995, the number of employees has remained stable at, or near, thirty five.

- Since 1995, USA Polymer has employed approximately 235 different individuals.

- Since 1995, the workforce at USA Polymer has experienced turnover rate of six-hundred-seventy-two percent (672%) in its workforce.

- Only 5 employees of USA Polymer's current workforce of 36, were employed at the time the conduct in issue occurred in 1995.

- Since 1995, the work force at USA Polymer has been reduced by approximately 30 people as a result of increased automation in the production process. Several material handling positions were eliminated by the purchase of an automated system to transfer materials between the grinding and the washing phases of production. This transfer was previously completed manually. Moreover, additional

material handling positions were eliminated as a result USA Polymer's current practice of purchasing post-consumer recycled plastics in pre-sorted bales.

- Since 1995, the assumptions relied upon concerning expected continuity of representation may not have come to fruition.

- Since 1995, USA Polymer has greatly reduced the sale of recycled pellets. Where the sale of recycled pellets formerly constituted 100% of USA Polymer's business, it currently accounts for approximately 75%. USA Polymer is currently undertaking a transition away from unprofitable recycled pellet sales, and towards the production of slip sheets, an entirely new and distinct product line. It is expected that within a year, the sale of slip sheets will account for approximately 75% of USA Polymer's business, with the sale of recycled pellets accounting for only 25%.

- Since 1995, USA Polymer has undergone significant corporate reorganization and is under new ownership.

II. Current Evidence was Previously Unavailable.

In the exceptions taken to the Administrative Law Judge's ("ALJ") ruling, USA Polymer excepted to the propriety of a bargaining order as an appropriate remedy. (Resp. Except at 10; Br. Supp. Resp. Except at 10-11). Much

of the evidence that requires this conclusion, however, has come into existence since the time of the ALJ's ruling in 1996. While it is clear that USA timely and properly excepted to the issuance of a bargaining order, unfair prejudice will result if it is not permitted to supplement the factual record with evidence supporting its objection.

The evidence now presented by USA Polymer was unavailable at the time of the record of the hearings before the ALJ were closed. Specifically, this cause was heard before an Administrative Law Judge in Houston, Texas from June 5, 1995 through June 21, 1995. A second hearing was held on October 17-18, 1995.

At the time of the Board's final decision, issued August 24, 1999, more than four and one-half years have passed. New evidence supplemented in this timely motion requires a different result than that reached by the Board.[2]

---

[2] While this motion primarily focuses on evidence detailing the impropriety of the issuance of the bargaining order, USA Polymer does not accept the Board's findings and conclusions on other issues and does not waive, in any respect, objections or exceptions to other findings of the Board. USA Polymer reserves the right to raise such objections and exceptions, as necessary, in the future in the appellate process.

III. New Evidence Requires that the Bargaining Order be Vacated.

A. Elections are the Preferred Method for Determining a Bargaining Representative.

A bargaining order is an "extraordinary remedy" that is not automatically entitled to enforcement. *NLRB v. American Cable Sys., Inc.*, 427 F.2d 446, 448 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 934, 938-939 (D.C. Cir, 1991)(noting that "a bargaining order is not a snake-oil cure for whatever ails the workplace; it is an extreme remedy"). The Board can issue a bargaining order upon a determination "that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance be better protected by a bargaining order." *NLRB v. Gissel*, 395 U.S. 575, 610-616 (1969). It is clear, however, that because elections are the preferred method for determining a bargaining representative "to grant a bargaining order in any instance other than in the last resort (when other traditional remedies are available) constitutes an abuse of the Board's discretion." *Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156, 1159 (7th Cir. 1990) (internal citation omitted). To this end, it is critical that the Board "consider all the relevant evidence concerning the availability of other, more traditional remedies before issuing a broad bargaining order." *Id* (citing *Impact Indus. Inc. v. NLRB*, 847 F.2d 379, 383 (7th Cir. 1988). As noted by Circuit Court of Appeals for the District of Columbia, "freedom of employee choice is a matter at the very center of our national labor relations policy and a secret election is the preferred method

of gauging choice. The fact that an employer's actions have tainted one election does not necessarily mean that subsequent elections will also be tainted. Where a fair re-run election is possible, it must be held." *Avecor v. NLRB,* 932 F.2d at 934 (internal citation and quotation omitted).

Accordingly, the Board should grant this motion to reconsider in light of all the relevant facts, the propriety of requiring USA Polymer to bargain exclusively with UNITE.

B. The Propriety of the Bargaining Order is to be Determined at the Date it is Issued.

Courts have repeatedly held that the Board is to determine the appropriateness of a *Gissel* bargaining order in light of circumstances existing at the time it is entered. *See, e.g., Charlotte Amphitheater Corp. v, NLRB,* 82 F.3d 1074, 1078 (D.C. Cir. *1996); Avecor, Inc. v. NLRB,* 931 F.2d 924, 926-37 (D.C. Cir. 1991). To do otherwise is discordant with the basic philosophy of the National Labor Relations Act because it may result in the appointment of a collective bargaining representative that employees have neither chosen nor desire. *See, NLRB v. Village IX. Inc.,* 723 F.2d 1360, 1370-71 (7th Cir. 1983). In making this determination it is necessary for the Board to consider circumstances that have changed since the occurrence of any unfair labor practice. *See, NLRB v. Cell Agriculture Mfg. Co.,* 41 F.3d 389, 398 (8th Cir. 1994) (citing cases in 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 11th, and D.C. Circuits). As described below, such an evaluation of changed circumstances often focuses on turnover in the work force, the passage of time, as well as other conditions.

C. Significant Employee Turnover Requires Vacating the Bargaining Order.

In the present case, new evidence proffered by USA Polymer demonstrates that since January 1995, the work force at USA Polymer has experienced a 672% turnover. Specifically, of the 90 employees currently employed in the positions covered by the bargaining unit, only five employees were employed at the time of the alleged unfair labor practiees. This level of employee turnover has occurred as result of economic conditions, USA Polymers transition to an entirely new product line, and voluntary employee attrition.

A large number of cases stand for the proposition that comparable, or significantly less, employee turnover has been found sufficient to require the vacating of a bargaining order in favor of the preferred method of an election. *See, e.g., Montgomery Ward,* 904 F.2d at 1160 (no enforcement in light of 80% turnover and 8 year delay); *J.L.M., Inc. v. NLRB,* 31 F.3d 79, 84-85 (2nd Cir. 1994) (no enforcement given turnover between 41% and 57%); *NLRB v. Knogo Corp.* 727 F.2d 55, 60-61 (2nd Cir. 1984) (several hallmark unfair labor practices; no enforcement given 4 year delay and 60% turnover); *NLRB v. Jamaica Towing Co.*, 632 F.2d 208, 216 (2nd Cir. 1980) (no enforcement given a 4½ year delay and 75% turnover). The rationale of each of these cases is simple: when the effects of unfair labor practices have long since dissipated, it is error to impose a bargaining order where an election could properly be held in its stead.

D. Passage of Time Requires Vacating the Bargaining Order.

The passage of time since the alleged unfair labor practices also requires that the bargaining order be set aside. Like employee turnover, the passage of time has been held to cleanse a voting environment of any lingering effects of past unfair labor practices.

In the present case, the bargaining order was imposed based on circumstances that existed more than four and one-half years ago. Even if employee turnover was less significant than described above, the passage of this amount of time has substantially dispelled the effects of any unfair labor practices and greatly increased the ability of traditional remedies to properly determine a bargaining representative. A large number of courts have adopted this position and refused to enforce bargaining orders in light of the passage of time. *See,* e.g., *Comcast Cablevision of Philadelphia, L.P.*, 4-CA-19155, 4-CA-19451, 4-CA-19569, 4-RC-17321, NLRB Dec. (CCH) 216183 (May 24, 1999); *Montgomery Ward & Co., Inc.*, 904 F.2d at 1158-1159 (denying enforcement after 8 years); *Knogo Corp.*, 727 F.2d at 60-61 (no enforcement in light of four year delay); NLRB v. *Pace Oldsmobile, Inc.* 739 F.2d 108, 110-111 (2nd Cir. 1984) (no enforcement given 4½ year delay); *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838, 841-42 (4th Cir. 1982) (no enforcement in light of 4½ year delay); *Jamaica Towing Co.*, 632 F.2d at 216 (no enforcement given five year delay).

In the present case, the passage of time is particularly compelling in light of the other factors of employee turnover,

discussed above, and the merger between the unions, as well as USA Polymer's corporate reorganization, discussed below.

E. Reality of Merger Between the Unions Requires Vacating the Bargaining Order.

At the time of the alleged unfair labor practices, the ILGWU was in the process of merging with ACTWU to form UNITE. In reaching the conclusion that a bargaining order requiring USA Polymer to bargain with UNITE was appropriate, the Administrative Law Judge and the Board relied on the assumptions that: (1) the new entity will utilize the same leaders for contract administration and negotiation, and (2) the same rules, dues and infrastructure present under ILGWU would exist under UNITE. Even if reliance on these assumptions in 1995 was appropriate,[3] reliance on such assumptions is certainly not proper in 1999. Given the extraordinary nature of imposing a bargaining order, reliance on these assumptions, which may have proven to be incorrect, is unjustified at this juncture. The factual record must be reopened to consider if UNITE, in light of actual occurrences since the merger of ILGWU and ACTWU, does, in fact, have substantial continuity of representation for the employees of USA Polymers in 1999.

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[3] USA Polymer does not agree that reliance on such factors was warranted, even in 1995.

F. Corporate Reorganization and Change in Ownership Requires Vacation of the Bargaining Order.

An additional factor dictates that the bargaining order is improper: since 1995, USA Polymer has under gone a change in ownership and is currently in transition from its former, primary business of selling recycled plastic pellets towards a new and distinct product line, the production of slip sheets. *See*, Affidavit attached as Exhibit A. The change in ownership further indicates that any effects of the events alleged to have occurred in 1995, have long since dissipated, *See*, e.g., *Impact Indus.*, 847 F.2d at 383 (noting that "if a fair and impartial election can be conducted, a likely event in light of the high turnover in both the workforce and management, a bargaining order is unnecessary. To grant a bargaining order in any instance other than in the last resort (when other traditional remedies are available) constitutes an abuse of discretion.). In addition, the recent transition away from the unprofitable sale of recycled pellets and towards the production of slip sheets, has engendered further change in the workplace conditions at USA Polymers. To impose a bargaining order on the current workforce and management of USA Polymer, without considering the current circumstances, cannot be justified and is improper.

CONCLUSION

A bargaining order is an extraordinary remedy that is only proper when other traditional Board remedies are insufficient. A bargaining undermines the fundamental principle that employees should have the right to vote by secret ballot to select the collective bargaining representative

they desire, if any. In the present case new facts that were unavailable when the factual record closed in 1995 all strongly indicate that a bargaining order issued in 1995 is unlikely to reflect the will of the current employees at USA Polymer. Specifically, a more than 600% rate of turnover in USA Polymer's workforce, the passage of more than four and one half years, the intervening merger involving the ILGWU and ACTWU to form a new union, and the change in the corporate ownership of USA Polymer and the products that it produces, all require an outcome different than that recently ordered by the Board. Accordingly, USA Polymer moves that the Board reopen the factual record to consider each of these significant changes that have occurred since 1995 and vacate the current bargaining as an inappropriate remedy or, in the alternative, grant a rehearing of this matter. In addition, USA Polymer moves for any and all relief to which it is entitled.

Dated: September 24, 1999
Houston, Texas

Respectfully submitted,

Bracewell & Patterson, L.L.P.
/s/_____

V. Scott Kneese
State Bar No. 11591000
South Tower Pennzoil Place
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
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Facsimile: (713) 221-1212
Attorney for USA Polymer Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing USA Polymer Corporation's Motion for Reconsideration, for Reopening the Record and for Rehearing was sent via certified mail, return receipt requested, to all counsel of record listed below on this 24th day of September, 1999.

Robert G Levy II, Esq.
National Labor Relations Board
Region 16
440 Louisiana, Suite 550
Houston, Texas 77002

Liane Janovsky. Esq.
Attorney for Charging Party
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National Labor Relations Board
Region 16, Regional Office
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102-6178
Attn: Regional Director

/s/_____
V. Scott Kneese

STATE OF TEXAS
COUNTY OF HARRIS

AFFIDAVIT OF JACOBO BAZBAZ

COMES NOW, Jacobo Bazbaz, who, having been duly sworn, upon her oath stated as follows:

1. My name is Jacobo Bazbaz. I am over the age of 21 years and competent to make this affidavit. All the facts contained in this affidavit are true and correct, based on my personal knowledge.

2. I hold the position of President of USA Polymer Corporation.

3. Since 1995, the number of employees has remained stable at, or near, thirty five,

3. Since 1995, USA Polymer has employed approximately 235 different individuals.

4. Only 5 employees of USA Polymer's current workforce of 36, were employed at the time the conduct in issue occurred in January, 1995.

5. As a result, USA Polymer has experienced a 672% turnover in its workforce since 1995.

6. Since 1995, the workforce at USA Polymer has been reduced by approximately 30 employees as the result of increased automation in the production process. Specifically, several material handling positions were

eliminated by the purchase of an automated system to transfer materials between the grinding and the washing phases of production. This transfer was previously completed manually. Moreover, additional material handling positions were eliminated as a result USA Polymer's current practice of purchasing post-consumer recycled plastics in pre-sorted bales.

7. Since 1995, USA Polymer has greatly reduced the sale of recycled pellets. Where the sale of recycled pellets formerly constituted 100% of USA Polymer's business, it currently accounts for approximately 75%. USA Polymer is currently undertaking a transition away from unprofitable recycled pellet sales, and towards the production of slip sheets, an entirely new and distinct product line. It is expected that within a year, the sale of slip sheets will account for approximately 75% of USA Polymer's business, with the sale of recycled pellets accounting for only 25%.

8. Since 1995, USA Polymer has undergone significant corporate reorganization and is under entirely new ownership.

Further affiant sayeth not.

/s/_____
Jacobo Bazbaz

STATE OF TEXAS

COUNTY OF HARRIS

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public, by the said 23rd on this 23rd day of September 23, 1999.

/s/_____
Notary Public, in and for
(seal) The State of Texas

My Commission Expires: 1/19/02

APPENDIX E

General Docket

US Court of Appeals for the Fifth Circuit

Court of Appeals Docket #: 00-60173
Filed: 3/6/00
Nsuit: 0
NLRB v. USA Polymer Corp
Appeal from: National Labor Relations Board

Lower court information:

District: 0539-1 : 16-CA-17189
Date Filed: **/**/**
Date order/judgment: 8/24/99
Date NOA filed: **/**/**
District: 0539-1 : 16-CA-17455
Date Filed: **/**/**
Date order/judgment: 8/24/99
Date NOA filed: **/**/**

Fee status: United States Appeal

Prior cases:
None
Current cases:
None

00-60173 NLRB v. USA Polymer Corp

NATIONAL LABOR RELATIONS BOARD
Petitioner

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Respondent

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00-60173 NLRB v. USA Polymer Corp

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

USA POLYMER CORP
Respondent

00-60173 NLRB v. USA Polymer Corp

3/6/00	NLRB case docketed. [00-60173] Answer of Respondent due on 3/29/00 for USA Polymer Corp. ROA due on 4/19/00. (pab)
3/6/00	Application filed by Petitioner NLRB for enforcement. [1561284-1] [00-60173] (pab)
3/20/00	Appearance form filed by Aileen A Armstrong for Petitioner NLRB. [00-60173] (kgl)
3/21/00	Answer filed by Respondent USA Polymer Corp to application for enforcement [1561284-1] by Petitioner NLRB Answer of Respondent ddl satisfied. [1577532-1] [00-60173] (SEND TO SCREENING JUDGE AND PANEL) (lba)
3/23/00	Appearance form filed by Jonathon R Larrabee for Respondent USA Polymer Corp, V Scott Kneese for Respondent USA Polymer Corp. [00-60173] (kgl)
3/27/00	Appearance form filed by David S Habenstreit for Petitioner NLRB. [00-60173] (kgl)
4/17/00	Appearance form filed by Usha Dheenan for Petitioner NLRB. [00-60173] (kgl)
4/18/00	Certified list filed in lieu of record. [00-60173] ROA ddl satisfied. (mjp)
4/18/00	Record on appeal filed. Vol(s) of Pleadings: All in 2 Large boxes. [00-60173] (mjp)

4/19/00	Briefing notice issued. [00-60173] A/Pet's Brief due on 5/30/00 for USA Polymer Corp. (mjp)
5/17/00	Extension granted by phone until: 6/16/00 to file brief for Petitioner USA Polymer Corp. [00-60173] (lba)
5/19/00	Record on appeal released to attorney Jonathon R Larrabee for Petitioner USA Polymer Corp. Volumes: Pleadings in 2 large boxes. [00-60173] (lrc)
5/22/00	Confirmation letter filed by Petitioner USA Polymer Corp confirming an extension of time to and including 6/16/00 for filing Petitioner's Brief. [00-60173] A/Pet's Brief ddl updated to 6/16/00 for USA Polymer Corp. (snd)
6/16/00	Appellant's Brief filed by Petitioner USA Polymer Corp. Copies of brief: 7 # of pages: 33. Word count: 7848 Disk Provided [Y/N]: y Date of COS: 6/15/00 Sufficient [Y/N]:n COS must show service of disk. [00-60173] A/Pet's Brief ddl satisfied. E/Res's Brief due on 7/17/00 for NLRB . Sufficient Brief due on 6/30/00 for USA Polymer Corp. (trm)
6/16/00	Record excerpts filed by Petitioner USA Polymer Corp # of copies: 4 Sufficient [Y/N]: y . [00-60173] (trm)

00-60173 NLRB v. USA Polymer Corp

6/19/00	Record on appeal returned to 5CCA. Exhibits: 2 boxes [00-60173] (kgl)
6/27/00	Extension granted by phone until: 8/16/00 to file NLRB's brief for Respondent NLRB. [00-60173] (lba)
6/30/00	Brief made sufficient by Petitioner USA Polymer Corp Replacement Disk Provided [Y/N]: n [00-60173] Sufficient Brief ddl satisfied. (trm)
7/3/00	Confirmation letter filed by Respondent NLRB confirming an extension of time to and including 8/16/00 for filing respondent's brief. [00-60173] E/Res's Brief ddl updated to 8/16/00 for NLRB. (lwg)
7/17/00	Unopposed motion filed by Respondent NLRB to correct the record [1823514-1] Excess Pages? (Y/N) n [00-60173] (agl)
7/17/00	CLERK Order filed granting motion to correct the record [1823514-1] Copies to all counsel. [00-60173] (lwg)
7/17/00	Supplemental record on appeal filed. Supplement #: 1 Vol(s) of Pleadings: 1 [00-60173] (hjg)

8/18/00	Appellee's Brief filed by Respondent NLRB. Copies of Brief: 7 # of pages: 52. Word count: 11721 Disk Provided [Y/N]: y Date of COS: 8/16/00 Sufficient [Y/N]:y.[00-60173] E/Res's Brief ddl satisfied. Reply Brief due on 9/1/00 for USA Polymer Corp. (jtr)
8/24/00	Record on appeal released to attorney V Scott Kneese for Petitioner USA Polymer Corp. 2 boxes of pleadings Supplemental Volumes: 1. [00-60173] (kgl)
8/28/00	Unopposed motion filed by Petitioner USA Polymer Corp to extend time to file reply brief until 9/15/00 [1862780-1] Excess Pages? (Y/N) n [00-60173] (agl)
8/29/00	CLERK Order filed granting unopposed motion to extend time to file Reply Brief [1862780-1] Reply Brief ddl updated to 9/15/00 for USA Polymer Corp. Copies to all counsel. [00-60173] (jca)
9/15/00	Record on appeal returned to 5CCA. 2 boxes of pleadings Supplemental Volumes: 1 [00-60173] (kgl)
9/18/00	Reply brief filed by Petitioner USA Polymer Corp. Copies: 7 # of pages: 29. Word count: 6926 Disk Provided [Y/N]: y Date of COS: 9/15/00 Sufficient [Y/N]: y. [00-60173] Reply Brief ddl satisfied. (trm)

12/11/00	Case tentatively calendared for oral argument Week of: 02/05/01. [00-60173] (pft)

00-60173 NLRB v. USA Polymer Corp

12/22/00	Case calendared for oral argument. [00-60173] (vlb)
2/5/01	Supplemental authorities (FRAP 28(j)) filed by Petitioner USA Polymer Corp [3129363-1] . [00-60173] (vlb)
2/7/01	COURT Order filed striking 28(j) letter for noncompliance with the rule [3129363-1] by Petitioner USA Polymer Corp. (RMP) Copies to all counsel. [00-60173] (vlb)
2/7/01	The 28(j) letter [3129363-1] by Petitioner USA Polymer Corp is stricken for noncompliance with the rule. [00-60173] (vlb)
2/7/01	Supplemental authorities (FRAP 28(j)) filed by Petitioner USA Polymer Corp [3132721-1] . [00-60173] (vlb)
2/8/01	Oral argument heard. Case argued by V Scott Kneese for Petitioner USA Polymer Corp, Usha Dheenan for Respondent NLRB [00-60173] (vlb)
2/26/01	Supplemental authorities (FRAP 28(j)) filed by Respondent NLRB [3149061-1]. [00-60173] (cnf)

8/27/01	Supplemental authorities (FRAP 28(j)) filed by Respondent NLRB [3356848-1]. [00-60173] (cnf)
11/6/01	Opinion filed. Issd in T form? y Issue Mandate due on 12/28/01. [00-60173] (jma)
11/6/01	Judgment entered and filed. [00-60173] (jma)
11/6/01	Costs taxed against USA Polyner Corp. Copies to counsel. [3421875-1] [00-60173] (jma)
11/15/01	Bill of costs filed by Petitioner NLRB. [3433745-1] [00-60173] (jtr)
12/20/01	Petition filed by Respondent USA Polymer Corp for rehearing. # of copies filed: 4 [3465336-1] Issue Mandate ddl canceled. Sufficient [Y/N]: Y . [00-60173] (cnf)
1/8/02	COURT Order filed denying petition for rehearing [3465336-1] Issue Mandate due on 1/15/02. Copies to all counsel. [00-60173] (cnf)
1/16/02	Mandate issued. Approved BOC Issued (Y/N)?: n [00-60173] Issue Mandate ddl satisfied. (jca)
2/14/02	Motion filed by Respondent USA Polymer Corp for partial recall of the mandate [3511968-1];To stay the mandate as to the "Gissel" bargaining order pending petition for writ of certiorari.[3511968-2]

Response/Opposition due on 2/25/02. Sufficient [Y/N]: y. [00-60173] (lbm)

00-60173 NLRB v. USA Polymer Corp

2/26/02 Motion filed by Petitioner NLRB to extend time to file response to motion to recall the mandate [3511968-1] by Respondent USA Polymer Corp, motion to stay mandate [3511968-2] by Respondent USA Polymer Corp [3621170-1]. Sufficient [Y/N]: Y. [00-60173] (pok)

2/26/02 CLERK Order filed granting petitioner's unopposed motion to extend time to file opposition to motion for partial recall and stay of mandate. [3621170-1] Copies to all counsel. [00-60173] (lbm)

3/1/02 Response/opposition filed by Petitioner NLRB to motion to recall the mandate [3511968-1] by Respondent USA Polymer Corp; motion to stay mandate [3511968-2] by Respondent USA Polymer Corp Response/Opposition ddl satisfied. Reply to Resp/Opp due on 3/8/02. Sufficient [Y/N]: y. [3626091-1] [00-60173] (lbm)

3/8/02	Reply filed by Respondent USA Polymer Corp to response/opposition [3626091-1], to motion to recall the mandate [3511968-1], and motion to stay mandate [3511968-2]. Reply to Resp/Opp due ddl satisfied. Sufficient [Y/N]: Y. [3636839-1] [00-60173] (mrb)

APPENDIX F

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY
Facsimile Transmittal Sheet

Addressee:
V. Scott Kneese - 713-221-1212
W.M. Head - 713-658-2553
Liane Janovsky - 214-634-0407

Originator:
Richard D. Hardick
Associate Executive Secretary

1099 14th Street NW
Washington, D.C. 20570
Telephone: (202) 273-1935

Date: 10/5/99

Pages (including this cover sheet): 2

Operator: /s/ _____

Remarks:
U.S.A. Polymer Corp. 16-CA-17189, et al.

Letter to V. Scott Kneese from Richard Hardick - 10/5/99

United States Government

NATIONAL LABOR RELATIONS BOARD
1099 14th STREET NW
WASHINGTON DC 20570

October 5, 1999
Re: U.S.A. Polymer Corp.
Cases 16-CA-17189:17455

V. Scott Kneese, Esq.
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street Suite 2900
Houston, TX 77002-2781

Dear Mr. Kneese:

This will acknowledge receipt of Respondent's Motion for Reconsideration, for Reopening the Record and Rehearing in the Board's Decision and Order (328 NLRB No. 177).

Section 102.48 (d)(2) of the Board's Rules and Regulations states that any motion for reconsideration, rehearing, or reopening the record, "shall be filed within 28 days... after service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence." In these circumstances, "service" is construed to be completed upon deposit of the document in the United States Mail. As the Board's decision was deposited in the mail on August 24, 1999, and no request for any extension of time to file a motion for reconsideration was filed by any party to this

proceeding, the due date for a motion for reconsideration was September 21, 1999. As your documents were dated September 24, 1999, and received on September 29, 1999, they are untimely, and cannot be forwarded to the Board for consideration. Moreover, the "new" evidence you seek to introduce does not appear to be newly discovered or of the type that would otherwise exempt your request from the 28-day deadline.

Very truly yours,

/s/ _____
Richard D. Hardick
Associate Executive Secretary

cc: Parties.

APPENDIX G

V. Scott Kneese
Bracewell & Patterson, L.L.P.
Attorneys at Law

October 8, 1999

Mr. Richard D. Hardick
Associate Executive Secretary
National Labor Relations Board
1099 14th Street
Washington, D.C. 20570-0001

Re: Case 16-CA-17455, *USA Polymer Corp. and Texas-Oklahoma-Arkansas District Council, UNITE a/w Union of Needle Trades, Industrial & Textile Employees*, consolidated with, Case 16-CA-17189, *USA Polymer Corp. and Texas-Oklahoma-Arkansas District Council, ILGWU a/w International Ladies' Garment Workers Union*, before the National Labor Relations Board.

Dear Mr. Hardick:

The circumstances that gave rise to this matter occurred in January, 1995. The factual record closed at the end of hearings held October 17-18, 1995. On August 24, 1999, the Board issued its opinion in this case. During the

four years that the current case awaited a decision from the Board many significant and relevant events occurred at USA Polymer Corporation ("USA Polymer"). Among these events were the change of ownership and control at USA Polymer as well as the retirement of USA Polymer's original counsel for this matter. As should be clear from the recently filed Motion, new counsel has been retained to represent USA Polymer.

Upon being sent, via mail, the Board's decision of August 24, 1999, which was not received until August 30, 1999, USA Polymer contacted new counsel. Thereafter, research and evaluation of events that had occurred during the long pendency of this action before the Board was begun. In the midst of new counsel's effort to become familiar with the allegations underlying the claim and significant intervening events that occurred during the pendency of this action before the Board, an inadvertent interpretation of the time limits resulted in the current Motion being filed via certified mail on September 24, 1999. A date which, according to your letter of October 5, 1999, was three days past the due date of September 21, 1999. As a result, you have decided that USA Polymer's Motion will not "be forwarded to the Board for consideration." This letter serves as USA Polymer's initial response to your letter of October 5, 1999.

Even if untimely, justice requires that the Board exercise its discretion to consider the new evidence offered by USA Polymer. Section 102.48(d)(2) of the Board's Rules and regulations permits the filing of a Motion such as that submitted by USA Polymer "within 28 days, *or such further period as the Board may allow." Id.* (emphasis added). Pursuant to §102.121 of the Board's Rules and Regulations,

the regulations "shall be liberally construed to effectuate the purposes and provisions of the Act." For reasons described below, the Board should exercise its discretion, as justice requires, to consider the current Motion.

Your letter states that, apparently based on your own determination, that the "evidence [USA Polymer] seek[s] to introduce does not appear to be newly discovered or of the type that would otherwise exempt [USA Polymer's] request from the 28-day deadline." No basis for this determination is stated and it is simply incorrect. All of the evidence to be adduced by USA Polymer has occurred since the factual record in this case was closed in 1995. Moreover, at least one Court has found it to be reversible error and an abuse of discretion for the Board to refuse to reopen the factual record for reconsideration of the propriety of a *Gissel* bargaining order based on evidence nearly identical to the that offered by USA Polymer, even though that evidence was not timely filed. *Camvac Int'l, Inc. v. NLRB*, 877 F. 2d 62, 1989 U.S. App. LEXIS 8893, *4-*10 (6th Cir. 1989). In *Camvac,* three weeks after the filing deadline had passed, the employer attempted to introduce evidence that 90% employee turnover had occurred during the almost five years the case was awaiting Board action. The Board, however, summarily rejected the employer's motion as untimely and refused to consider the new evidence of employee turnover. On appeal, the Sixth Circuit Court of Appeals held that the Board had improperly refused to exercise the discretionary language found in 29 C.F.R. §102.48(d)(2) that specifically permits the Board to consider such motions beyond the 28 day period. Specifically, the Court stated [h]ere, the Board was directly .confronted with evidence that may well, upon full consideration, not only vitiate the need for the bargaining

order but also render the order positively unfair to current employees. ..." *Id.* at *6. Accordingly, the Sixth Circuit remanded the case to the Board with an order to fully consider the new evidence offered by the employer.

The evidence of intervening events detailed in USA Polymer's current Motion is even more compelling than that present in *Camvac*. As detailed in the Motion, since the factual record closed in 1995, USA Polymer has experienced turnover of 672%. In addition, the company has undergone a change in ownership, a shift in the products it produces, and the greatly reduced the size of its workforce. Moreover, the union that originally undertook to become the bargaining representative of USA Polymer employee's in 1995, the ILGWU, is no longer in existence. As a result of this extremely high level of employee turnover, as well as each of these other events, any lingering effects of the alleged unfair labor practices have long since dissipated. Accordingly, the propriety of the bargaining order must be reconsidered in light the present situation of USA Polymer and its current employees.

It also bears emphasis that, even if the Board decides not to exercise its discretion in §102.48(d), such a determination is to be made by the Board, rather than the Associate Executive Secretary.

No prejudice would result by the forwarding of the current Motion to the Board for consideration. Indeed, under the Federal Rules of Civil Procedure, as well as the former rules of the Board, the current Motion would be considered timely filed. *See, e,g.*, FED. R. CIV. P. 6(e) (requiring an additional three days be added to a filing period when items

are served on a party via mail); *Kessler Institute for Rehabilitation v. NLRB*, 669 F.2d 138, 139-140 (3rd Cir. 1982) (same). The wisdom of the three day rule is exhibited by the facts of this case. While the Board's decision may have been mailed on August 24, 1999, USA Polymer did not receive it until six days later, on August 30, 1999. If the 28-day period is calculated from the actual date of receipt by USA Polymer, the current Motion well within the 28-day period as mailed on September 24, 1999. The three day rule combats precisely this kind of unfair prejudice from befalling a party who does not receive an order until six after it is considered "served."

Great prejudice would result to USA Polymer as well as its current employees, if the company is required to bargain with, and the current employees are required to accept as a bargaining representative, a union, that was never elected in 1995, is no longer in existence, and is unrelated to the present circumstances at USA Polymer. An election, rather than a bargaining order, is the appropriate remedy in this case.

Where the lapse of time and the resultant employee turnover flow from the Board's own delay, it is more than a little inequitable to bar the introduction of USA Polymer's compelling new evidence. Moreover, in light of the Board's delay, it is also unseemly to do this based on an interpretation of barely missed time limits. To impose a bargaining order, after a such a long delay in the processing of this matter without consideration of changed circumstances, due to a unilateral determination by the Associate Executive Secretary that the current Motion should not be forwarded to the Board is, likewise, particularly unfair. Accordingly, USA Polymer

respectfully request that the current Motion be forwarded to the Board for full and proper consideration of its merits.

Very truly yours,

Bracewell & Patterson, L.L.P.

/s/ _____
V. Scott Kneese

JRL

cc: Via Facsimile and Certified Mail
Return Receipt Requested

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Letter to Richard Hardick from V. Scott Kneese - 10/8/99

National Labor Relations Board
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Receipt No:

Supreme Court, U.S.
FILED
MAY 22 2002
CLERK

No. 01-1392

In the Supreme Court of the United States

USA POLYMER CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (Board) abused its discretion when it declined to accept for filing petitioner's untimely motion to reopen the Board's proceedings.

2. Whether the Board reasonably determined, after a merger between two international unions, that an affiliate of the post-merger union continued the employee representation its predecessor had provided before the merger.

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In the Supreme Court of the United States

No. 01-1392

USA POLYMER CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 272 F.3d 289. The decision and order of the National Labor Relations Board (Board) (Pet. App. 18a-38a) and the decision and recommended order of the administrative law judge (ALJ) (Pet. App. 39a-160a) are reported at 328 N.L.R.B. 1242. The Board's order declining to accept for filing petitioner's untimely motion to reopen (App., *infra*, 1a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2001. A petition for rehearing was denied on January 8, 2002 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a plastics-recycling facility in Houston, Texas. Pet. App. 4a. In October 1994, a regional affiliate of the International Ladies' Garment Workers' Union (ILGWU) began a campaign to represent workers at petitioner's plant. *Id.* at 5a, 39a n.1, 42a-43a. By late January 1995, the ILGWU had obtained signed authorization cards to represent at least 58 of the 64 employees whom it sought to represent. *Id.* at 44a. On January 27, 1995, petitioner laid off 29 employees. All of the discharged workers had signed union authorization cards. *Id.* at 44a & n.4. Nine of the ten employees on a union organizing committee were laid off. *Id.* at 22a. The union filed charges with the Board, in which it alleged that petitioner had engaged in unfair labor practices including layoffs that were motivated by a desire to undermine the union's organizing campaign. *Id.* at 5a, 39a-40a.

On July 1, 1995, the ILGWU merged with the Amalgamated Clothing and Textile Workers Union to form the Union of Needle Trades, Industrial and Textile Employees (UNITE). The ILGWU affiliate that filed charges against petitioner became an affiliate of UNITE. See Pet. App. 39a & n.1.

Acting on the union's charges, the General Counsel of the Board issued administrative complaints against petitioner. Pet. App. 39a-40a. In March 1996, an ALJ found after a hearing that petitioner engaged in multiple unfair labor practices in violation of Section 8(a)(1), (3) and (4) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), (3) and 4. Those practices included threatening workers who engaged in union activities, firing workers in retaliation for their union organizing activities, and punishing workers for testifying about

the unfair labor practices. Pet. App. at 145a-148a; see *id.* at 39a-160a.

2. On August 24, 1999, the Board affirmed the ALJ's decision and held that petitioner committed "numerous, egregious" unfair labor practices in response to the union's organizing campaign, in violation of the Act. Pet. App. 19a. To remedy petitioner's violations, the Board directed petitioner—among other actions—to reinstate the 29 unlawfully laid-off employees and to bargain with the UNITE affiliate in accordance with *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 610-616 (1969). See Pet. App. 19a & n.2, 26a n.10, 27a-38a, 131a-134a.

In *Gissel*, this Court held that the Board may require an employer to bargain with a union, without an election by employees, in exceptional cases involving outrageous and pervasive unfair labor practices (referred to as "category I" cases), as well as in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (referred to as "category II" cases). 395 U.S. at 613-614.

The Board found in this case that petitioner's "intimidating course of conduct places it among those exceptional cases warranting a bargaining order under category I of the *Gissel* standard, because traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible." Pet. App. 23a. The Board alternatively found that a bargaining order is warranted under *Gissel* category II, because petitioner's violations of the Act—particularly its layoff of employees in retaliation for union activities—nullified the possibility that "employees would * * * express their uncoerced desires through the mechanism of an election." *Id.* at 25a.

When issuing the bargaining order pursuant to *Gissel*, the Board expressly considered that four years had elapsed since petitioner committed its unfair labor practices, and that the ILGWU had merged into UNITE during this time. Pet. App. 25a-27a n.10. The Board determined, however, that "the passage of time does not diminish the need for and appropriateness of a bargaining order in this case," *id.* at 25a n.10, and that petitioner had not shown that the UNITE affiliate failed to provide a continuity of representation with its predecessor ILGWU affiliate, *id.* at 26a-27a n.10.

3. On September 29, 1999, the Board received petitioner's motion for reconsideration of the August 24, 1999 decision, for reopening of the record, and for rehearing. Pet. App. 6a, 161a-177a. Petitioner contended in the motion that new evidence had come into existence after the ALJ's proceeding and that this evidence showed that "a bargaining order is an entirely inappropriate remedy." *Id.* at 163a. The Office of the Executive Secretary of the Board notified petitioner that its motion was untimely. See *id.* at 190a-191a. Petitioner then filed a letter asking the Board to accept the late filing and stating that petitioner was represented by new counsel who made "an inadvertent interpretation of the time limits" for filing the motion. *Id.* at 193a.

On November 23, 1999, the Board declined (over one member's dissent) to accept petitioner's motion for reconsideration and reopening. App., *infra*, 1a-8a. The Board explained that, under its rules of procedure, petitioner's motion was due 28 days after the August 24, 1999 decision—*i.e.*, on September 21, 1999. Yet petitioner's motion was dated September 24, 1999, and was received by the Board on September 29, 1999. *Id.* at 1a. The Board cited Section 102.48(d)(2) of the Board's

rules, which provides that a motion for reconsideration, rehearing, or reopening of the record "shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence." 29 C.F.R. 102.48(d)(2).

The Board further found that petitioner had not shown that its failure to meet the filing deadline was justified by "good cause * * * based on excusable neglect," as would be necessary to warrant acceptance of the late filing. App., *infra*, 3a-4a; see 29 C.F.R. 102.111(c) ("In unfair labor practice proceedings, motions * * * may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result."). The Board concluded that petitioner's "inadvertent misinterpretation of the time limit, even when considered in the context of counsel becoming familiar with the case and investigating whether any circumstances have changed since the commission of the unfair labor practices, does not rise to the level of excusable neglect." App., *infra*, 4a. The Board also noted that petitioner's counsel could have requested an extension of time to file a motion for reconsideration, but failed to do so. *Id.* at 4a n.5. Finally, the Board found that petitioner's motion was untimely for the additional reason that petitioner failed to explain adequately why its evidence (which involved employee turnover and other corporate changes since the ALJ's hearing) could not have been presented before the Board issued its decision. *Id.* at 4a-5a; see 29 C.F.R. 102.48(d)(1) ("A motion to reopen the record shall state briefly the additional evidence sought to be adduced, [and] why it was not presented previously.").

4. The United States Court of Appeals for the Fifth Circuit enforced the Board's order. Pet. App. 3a-17a. After reviewing an "admittedly confusing line of [Fifth Circuit] cases" on the subject, *id.* at 9a, the court of appeals held that when the Board evaluates the appropriateness of a *Gissel* bargaining order, it must consider record evidence of changed circumstances after the unfair labor practice occurred. *Id.* at 10a; see also *id.* at 16a (Board must "consider current circumstances when issuing a *Gissel* bargaining order").

The court made clear, however, that the Board is required only to consider evidence that is "properly presented or tendered," and that "[i]t is not the Board's responsibility to continually update the factual picture that the parties have provided." Pet. App. 14a. Thus, "[t]he party that seeks to benefit from demonstrating a change of circumstances bears the burden of timely providing the Board with evidence of those changes. The Board is entitled to assume, in the face of the parties' silence, that the facts as initially presented continue to adequately describe the employer's workforce." *Ibid.*

Applying those principles, the court of appeals concluded that the Board did not abuse its discretion when it refused to accept petitioner's untimely motion. Pet. App. 14a-15a. The court noted that the changed circumstances alleged by petitioner had "occurred gradually, over a period of years," and that petitioner "appears to have made a conscious decision to wait until after the Board's decision to inform the Board of the significant changes that had taken place in its workforce." *Id.* at 15a.

The court of appeals also rejected petitioner's contention that the factual record that was before the Board did not support the *Gissel* bargaining order. Pet.

App. 15a-16a. Although the court recognized that "[t]he imposition of a bargaining order is an extraordinary remedy," it held that the remedy is warranted in this case because there was substantial record evidence that petitioner "threatened and laid off a sizeable number of its workers due to union activity at its Houston plant." *Id.* at 16a.

ARGUMENT

1. Petitioner primarily argues that this Court should grant the petition in order to establish that "the passage of time and current conditions are factors that should be considered when determining whether to issue a *Gissel* bargaining order." Pet. 10; see *id.* at i (Question 1), 10-11, 14-16. The court of appeals, however, *agreed* with petitioner on this point. The court held that the Board must consider evidence of changed circumstances that may have occurred after the unfair labor practice (such as employee turnover and the passage of time) when it evaluates the appropriateness of entering a *Gissel* bargaining order. Pet. App. 8a, 10a, 16a.

As the Fifth Circuit noted in this case, the courts of appeals overwhelmingly require the Board to consider changed circumstances before it enters a *Gissel* bargaining order. Pet. App. 7a; see also *Charlotte Ampitheater Corp.* v. *NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (discussing cases); Pet. 14-16 (same). That judicial rule differs from the Board's own view that the propriety of a *Gissel* bargaining order should be based on the situation at the time the unfair labor practices were committed, rather than on circumstances that obtain when the Board issues its decision. See *Garvey Marine, Inc.*, 328 N.L.R.B. 991, 995 (1999), enforced, 245 F.3d 819 (D.C. Cir. 2001). "Otherwise," the Board

has explained, the employer "would be allowed to benefit from the effects of its wrongdoing," including "the delays inherent in the litigation process as well as employee turnover, some of which may occur as a direct result of the unlawful conduct." *Ibid.*

Although some courts thus disagree with the Board, this disagreement does not support the instant petition for a writ of certiorari. As noted, the Fifth Circuit adopted *petitioner's* position that changed circumstances must be considered. In this case, moreover, the Board did inquire whether the passage of time between petitioner's unfair labor practices and the Board's decision rendered a *Gissel* bargaining order inappropriate. The Board determined that, on the facts presented here, the passage of time "does not diminish the need for and appropriateness of a bargaining order." Pet. App. 25a n.10.[1]

In view of judicial applications of *Gissel*, it also is the Board's practice to consider record evidence of specific changed circumstances (in addition to the passage of time) when determining whether to issue a bargaining

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[1] There is no merit to petitioner's suggestion (Pet. 12-14) that the Board's decision in this case is inconsistent with decisions in which the Board has declined to issue a *Gissel* bargaining order due to the passage of time. None of the cases cited by petitioner (*id.* at 12-13) involved egregious, category I employer misconduct such as the Board found here. Moreover, those cases generally involved a greater lapse of time between the employer's violations and the Board's decision than occurred in this case. See *Audubon Reg'l Med. Ctr.*, 331 N.L.R.B. No. 42 (June 22, 2000), slip op. 4-5 (six years); *Regal Recycling, Inc.*, 329 N.L.R.B. 355, 355-357 (1999) (seven years); *Comcast Cablevision of Philadelphia, L.P.*, 328 N.L.R.B. 487, 487 & n.1 (1999) (eight years); *Cooper Hand Tools*, 328 N.L.R.B. 145, 162-166 (1999) (more than four years); *Wallace Int'l de Puerto Rico, Inc.*, 328 N.L.R.B. 29, 29 (1999) (nearly five years).

order. See, *e.g.*, *Garvey Marine, Inc.* v. *NLRB*, 245 F.3d 819, 828-829 (D.C. Cir. 2001) (upholding Board determination that bargaining order was appropriate despite changes in ownership of employing entity and workforce turnover); *Audubon Reg'l Med. Ctr.*, 331 N.L.R.B. No. 42 (June 22, 2000), slip op. 6 (declining to issue bargaining order where "none of the supervisory or managerial employees who perpetrated the unfair labor practices is still employed"). The Board's refusal to consider petitioner's new evidence in this case was based on petitioner's failure to make a timely submission of the evidence, *not* on a general rule against receiving such material. See App., *infra*, 1a-5a.

2. Petitioner next contends (Pet. 17-18) that this Court should grant certiorari to address the Board's supposed misapplication of its own rules governing the filing of motions for reconsideration, reopening, and rehearing. The courts, however, "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). In this case, petitioner fails to make any substantial showing that the Board's refusal to accept the late-proffered evidence was "plainly erroneous or inconsistent with the [relevant] regulation," *ibid.* (internal quotation marks omitted), much less that this procedural issue is sufficiently important to warrant this Court's review.

Petitioner argues (Pet. 16-19) that Board rules prevented petitioner from moving to submit additional evidence until after the Board rendered its decision on August 24, 1999. Petitioner is mistaken. The Board's rules plainly contemplate motions for leave to adduce additional evidence during the pendency of a Board proceeding, directing that such motions "shall be filed promptly on discovery of [the additional] evidence." 29

C.F.R. 102.48(d)(2). Section 102.48(d)(1) of the Board's rules, moreover, requires a party that files a motion to reopen based on additional evidence to "state * * * why [the additional evidence] was not presented previously." 29 C.F.R. 102.48(d)(1). Thus, as the court of appeals held in this case (see Pet. App. 14a-15a), the Board has reasonably concluded that a motion to reopen the record after a Board decision is untimely if the moving party, without adequate explanation, seeks to adduce evidence that was in the movant's possession during an earlier stage of the administrative proceedings. See *Labor Ready, Inc.*, 330 N.L.R.B. No. 151, 2000 WL 339961, at *1-*2 (Mar. 23, 2000); *Electro-Voice, Inc.*, 321 N.L.R.B. 444 (1996).[2]

Judicial decisions do not "cloud the issue" (Pet. 19) of when a motion to adduce new evidence may be filed with the Board. Insofar as they are relevant at all, the cases cited by petitioner (Pet. 19-20) illustrate that a standard of diligence—not satisfied here—applies to raising allegations of changed factual circumstances. See *Charlotte Amphitheater Corp.*, 82 F.3d at 1080 (before Board's decision, employer "moved to reopen the record with reasonable promptness following the

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[2] Petitioner incorrectly attributes to the court of appeals the view that 29 C.F.R. 102.48(d)(2) obligates parties to update the factual record continually during the pendency of their case. Pet. 17. The court of appeals made no such statement. It simply concluded that "[w]hile the Board must consider properly presented or tendered evidence of materially changed relevant circumstances in bargaining order cases, we can see no reason why the Board itself should be required to gather evidence." Pet. App. 14a; accord *Charlotte Amphitheater Corp.* v. *NLRB*, 82 F.3d 1074, 1080 (D.C. Cir. 1996) (Board has "no affirmative duty to inquire whether employee turnover or the passage of time has attenuated the effects of earlier unfair labor practices").

issuance of the ALJ's recommendation of a bargaining order"); *Texas Petrochems. Corp.* v. *NLRB*, 923 F.2d 398, 401 (5th Cir. 1991) (employer filed motion to reopen shortly after ALJ's decision). In *Camvac International, Inc.* v. *NLRB*, No. 88-5573, 1989 WL 65727 (June 20, 1989), the Sixth Circuit merely acknowledged that the Board has discretion to allow late filings. *Id.* at *2. The other cases cited by petitioner do not address the question of whether evidence is timely when offered in an unfair labor practice proceeding.

3. The Board, moreover, supported its denial of petitioner's motion to reopen on an alternative ground that is entirely independent of whether petitioner could have filed a motion to adduce new evidence before the Board issued its decision. The Board—affirmed by the court of appeals (Pet. App. 13a-14a)—explained that petitioner provided an inadequate excuse for failing to file its motion to reopen (or a motion for an extension of time) within 28 days *after* the Board's decision, as provided by the Board's rules. App., *infra*, 4a & n.5. Petitioner's argument (Pet. 21-22) that counsel did not receive the Board's August 24, 1999 decision until August 30, 1999, does little to explain petitioner's failure to make a timely filing of a motion to reopen and nothing to justify petitioner's failure to apply for an extension of time. Nor does petitioner's factbound argument raise any question that would warrant review by this Court.

4. There likewise is no merit to petitioner's final contention (Pet. 24-26) that the Board abused its discretion by issuing a bargaining order because the UNITE affiliate with which petitioner must bargain is "totally different" (Pet. 24) from the predecessor ILGWU affiliate that conducted the original organizing campaign. Petitioner does not make any specific chal-

lenge to the settled, four-part test that the Board used to determine whether there was a "continuity of representation" between the ILGWU affiliate and the successor UNITE affiliate. See Pet. App. 26a-27a n.10, 138a (applying *Western Commercial Transp., Inc.*, 288 N.L.R.B. 214 (1988)). Applying that test, the Board reasonably found, in agreement with the ALJ, that there was "considerable testimony and documentation" supporting the conclusion that "the post-merger entity, UNITE, provides for substantial continuity of representation" and that petitioner had not met its burden of proving discontinuity. Pet. App. 26a-27a n.10. The Board's determination was amply supported by the record, see *id.* at 138a-144a (ALJ's decision), and petitioner's attempt to exploit the happenstance of a union merger presents no issue that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2002

APPENDIX

[SEAL OMITTED]

United States Government

NATIONAL LABOR RELATIONS BOARD
1099 14th Street NW
WASHINGTON DC 20570

November 23, 1999

Re: U.S.A. Polymer Corp.
Cases 16-CA-17189 and 16-CA-17455
328 NLRB No. 177 (1999)

ORDER

Respondent requests that the Board exercise its discretion under Section 102.48(d)(2) of the Board's Rules and Regulations and accept its Motion for Reconsideration, for Reopening the Record and for Rehearing in this case notwithstanding that its Motion was filed beyond the 28 days following service of the Board Order. Alternatively, Respondent contends the Board should accept the late filing because its misinterpretation of the time limits constitutes excusable neglect under Section 102.111(c) of the Board's Rules and Regulations.

Section 102.48(d)(2) of the Board's Rules and Regulations requires any motion for reconsideration, rehearing or reopening of the record "be filed within 28 days, or such further period as the Board may allow, after service of the Board's decision or order. . . ." In the instant matter the motion was due on September 21, 1999. Respondent's Motion is dated September 24 and was received on September 29. The Motion was re-

jected as untimely by the Associate Executive Secretary and Respondent now request reconsideration of that rejection.

Respondent cites *Camvac International, Inc. v. NLRB*, 877 F.2d 62 (6th Cir., 1989), to support its position that Section 102.48(d)(2) of the Board's Rules and Regulations provides the Board with discretion to accept such requests received beyond the 28-days deadline. Specifically, Respondent contends that the clause "or such other period as the Board may allow" provides the authority to excuse late filings.

We disagree that *Camvac* or the cited clause compels consideration of a motion to reopen the record filed outside of the 28-day period following service of the Board order. Admittedly, the procedural facts in *Camvac* are similar to those in the instant matter. However, the Board accepted the court's decision in *Camvac* as the law of that case only.[1] It did not agree that the "or such other period" clause found in Section 102.48(d)(2) excused late filings. We also disagree with our dissenting colleague's view that the clause is specifically aimed at the enlargement of time for those post-decision motions noted in Section 102.48(d)(1).

In our view, that clause merely provides the Board with the discretion to allow additional time for the filing of the motion if a timely request for an extension is submitted or an extension is otherwise proper under the Board's Rules. In this regard we note that the clause is not unique to post-decisional motions, but is also included in the rules establishing filing periods for

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[1] *Camvac International, Inc.*, 297 NLRB 853, 854 (1990).

pre-decisional briefs, which deadlines can be extended.[2] The omission of the same clause from Section 102.46(h) on the filing of reply briefs, extensions for which are specifically prohibited, further supports conclusion that the purpose of the clause is to allow the Board to grant extensions when properly and timely requested. Moreover, interpreting the clause as urged by Respondent and our dissenting colleague would render amorphous and vague, if not meaningless, the specific pre and post-decisional deadlines that are contained in the Rules.

Furthermore, in 1991 when the Board announced that it would begin accepting late documents only on good cause based on excusable neglect, it noted that at that time, "the rules of the National Labor Relations Board make no provision for late filing of documents."[3] Of course, as noted above, the clause that Respondent and our dissenting colleague contend allows the late filing was contained in the Rules in 1991. Had the Board's interpretation of the clause been the same as Respondent's and the dissent's, it would not have characterized the Rules as devoid of such a provision.

Finally, we note that *Camvac* was decided before the Board instituted its excusable neglect rule. Whatever ambiguity there may have been prior to this new rule, it is now clear that late filings may be accepted only "upon good cause shown based on excusable neglect and when no undue prejudice would result." Section 102.111(c) of the Rules and Regulations. As the Board stated in announcing the new rule, "it would be

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[2] See the time constraints for the filing of exceptions, cross exceptions and answering briefs in Section 102.46 of the Board's Rules and Regulations.

[3] 56 Fed. Reg. 49141 (1991)

appropriate to include in Section 102.111 a formal basis for accepting certain late-filed documents in unfair labor practice cases. This provision is newly added as paragraph (c) of Section 102.111. Documents not covered by the new provision may not be filed after the time when they otherwise would be due."[4]

Here, we find that the Respondent has failed to satisfy the requirements of Section 102.111(c). In *Pioneer Investment Co. v. Brunswick Associates*, 507 U.S. 380 (1993), a bankruptcy case, the Supreme Court recognized that excusable neglect is an elastic concept, not limited strictly to omissions caused by circumstances beyond the control of the movant. However, although the Court instructed that the decision is at bottom an equitable one, it also warned that inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect. In the instant matter, the Respondent's inadvertent misinterpretation of the time limit, even when considered in the context of counsel becoming familiar with the case and investigating whether any circumstances have changed since the commission of the unfair labor practices, does not rise to the level of excusable neglect.[5]

Moreover, to the extent the Respondent's motion seeks to adduce additional evidence regarding employee turnover and other corporate changes since the unfair labor practice hearing, it is also untimely on the ground that the Respondent has failed to adequately

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[4] *Ibid.*

[5] While we can appreciate that a new counsel retained after issuance of the Board decision may need some time to become familiar with the case, we note that counsel was free anytime during the 28 days following service of the decision to request an extension to file its request for reconsideration, but chose not to do so.

state "why [the evidence] was not presented previously" as required by Section 102.48(d)(1) of the Board's rules. See *Electro-Voice, Inc.*, 321 NLRB 444 (1996), where the Board, for this reason, rejected as untimely a similar motion to reopen the record to adduce evidence of posthearing turnover, notwithstanding that the motion was filed within 28 days of the Board's decision. As in that case, the Respondent here was clearly in the possession of the evidence during the time that the case was pending before the Board on exceptions and has offered no explanation for its failure to raise the evidence until after the Board's decision issued.[6]

Accordingly, based on the foregoing, Respondent's request for reconsideration of the rejection of its late-filed Motion is denied. By direction of the Board:

Richard D. Hardick
Associate Executive Secretary

MEMBER HURTGEN, dissenting:

I would accept Respondent's motion for reconsideration. It was sent on September 24 and received on September 29. Under Section 102.48(d)(2), the motion was due on September 21 "or such further period as the Board may allow."[1]

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[6] See also Section 102.48(d)(2), which requires that motions for leave to adduce additonal evidence be filed "promptly on discovery of such evidence."

[1] My colleagues acknowledge that a new counsel, retained after the issuance of the Board decision, would need some time to become familiar with the case. However, they then say that *Respondent*, at an earlier time, could have sought to adduce additional

I would allow the additional minimal period, and thus I would accept the motion. In this regard, I note that, under the quoted language of Section 102.48(d)(2), a court has ordered the Board to received a motion for reconsideration in a similar case. See *Camvac International, Inc. v. NLRB*, , 877 F.2d 62 (6th Cir., 1989). As here, *Camvac* involved a *Gissel* order and a motion for reconsideration based on passage of time and turnover. In addition, I note that the motion here was filed by new counsel, retained after the issuance of the Board order. In these circumstances, I would accept the motion for reconsideration.

My colleagues argue that *Camvac* is not controlling because Section 102.111(c)—the "excusable neglect" rule—was added to the Rules after *Camvac*. The argument has no merit. Section 102.111 (c) and Section 102.48 (d)(2) are two separate provisions, and they are analytically distinct. Section 102.48(d)(2) is aimed specifically at motion for reconsideration. It provides that the Board can enlarge the time period for such motions. It can do so without reference to excusable neglect. When the Board so enlarges the time, the document is not late. By contrast, Section 102.111(c) is a general provision. If provides that the Board will accept a late document if there is excusable neglect.

The court in *Camvac* relied on 102.48(d)(2), and so do I. I recognize that Section 102.111(c) was promulgated after *Camvac*. However, the section simply adds another argument for the Respondent, i.e., the "excusable neglect" argument. Clearly, however, this "new" section does not detract from the force of Respondent's

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evidence. In these circumstances, the acknowledgement of the difficulties facing new counsel rings a bit hollow.

primary argument based on 102.48(d)(2). As noted, my conclusion, like that of the court in *Camvac*, rests on that rule.[2]

My colleagues point out that the language on which I rely ("or such other period as the Board may allow") is present in regard to the timeliness of some documents and is absent in regard to the timeliness of others. I do not see how this point aids the position of my colleagues. The language is present with respect to the document involved herein, viz. a motion for reconsideration.[3]

The language on which I rely does not render the relevant rules amorphous, vague, or meaningless. Those rules remain clear, including the clear provision that the Board may, within its discretion, enlarge the time period for the filing of certain documents. In the absence of the exercise of such discretion, the numerical time limits remain precisely as they are stated.

My colleagues refer several times to "late" documents (see, e.g., the discussion of the 1991 announcement). However, as noted supra, when the Board enlarges the time period for a motion, the motion, if filed within the enlarged period, is, by definition, not a late-filed document.

My colleagues also argue that it is too late for Respondent to adduce additional evidence regarding matters occurring "since the unfair labor practice hearing." The argument has no merit. Section 102.48(d)(1)

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[2] Thus, I do not pass on whether there was "excusable neglect' under Section 102.111(c).

[3] Where the language is absent, there is a provision specifically prohibiting an extension of time (see 102.46[h]). That prohibition is not in Section 102.48(d)(2).

specifically provides that evidence that has become available "since the close of the hearing" can be accepted. My colleagues then go on to assert that Respondent has not explained "why (the evidence[)] was not presented previously." This assertion is also without foundation. As discussed supra, Respondent has explained that it has new counsel, retained after the issuance of the Board decision.[4] Indeed, my colleagues acknowledge that new counsel needed time to become familiar with the case. Having acknowledged this fact, my colleagues then turn around and slam the door on the submissions of new counsel.

cc: Parties

[4] By contrast, in *Electro-Voice*, 321 NLRB 444 (1996), there was no explanation at all.

Supreme Court, U.S.
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(3)

No. 01-1392

In the Supreme Court of the United States

U.S.A. POLYMER CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER U.S.A. POLYMER CORP.'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. Procedural History

On March 18, 2002, Petitioner, U.S.A. Polymer Corp. ("Polymer") filed its Petition for Writ of Certiorari (the "Petition") with the Court. On April 19, 2002, the Court extended the Solicitor General's deadline to file its response to Polymer's Petition to May 22, 2002. On May 22, 2002, the Solicitor General, on behalf of the National Labor Relations Board ("the Board"), filed its Opposition Brief.

II. The Opposition Brief Misstates and Overlooks Polymer's Arguments Regarding 29 C.F.R. § 102.48

In its Opposition Brief, the Solicitor General misstates Polymer's argument and overlooks the more important issue that Polymer presented in its Petition regarding the Board's contradictory Rules and Regulations.[1] In its Opposition Brief, the Solicitor General states: "Petitioner argues that Board rules prevented petitioner from moving to submit additional evidence until after the Board rendered its decision on August 24, 1999. Petitioner is mistaken." Opp. Brief at 9. The Solicitor General goes on to state that the Board rules "plainly contemplate" that motions to introduce additional evidence should be filed when the additional evidence is discovered. *See id.* Not only does this assertion mistakenly interpret Polymer's argument in its Petition, the Opposition Brief fails to provide a complete picture of the ambiguity in the Board's Rules.

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[1] The Solicitor General also avoids altogether the issue that the passage of time is a fact that need not be presented to the Board or court of appeals; the effects of the passage of time can be recognized on their own.

Polymer does not argue in its Petition that the Board rules *prevented* Polymer from filing its Motion to Reopen the Record until after the Board's decision. Instead, Polymer argues that the Court's guidance is needed to resolve the apparent contradiction in Section 102.48(d)(1) and Section 102.48(d)(2) of the Board's Rules. 29 C.F.R § 102.48. As asserted in the Petition, Section 102.48(d)(1) states that a party "may move for reconsideration, rehearing, or reopening of the record *after the Board decision or order.*" Pet. at 17. However, Section 102.48(d)(2) directs a party to a Board proceeding to file any motion to introduce additional evidence "promptly on discovery of such evidence." Pet. at 17-18. The Fifth Circuit upheld the Board's denial of Polymer's Motion to Reopen pursuant to Section 102.48(d)(2)[2]. Therefore, although Polymer does contend that the Board and Fifth Circuit's interpretation of Section 102.48 is flawed, Polymer also seeks the Court's review in order to establish a clear standard with regard to when Motions to Reopen should be filed.

III. The Opposition Brief Avoids Polymer's Arguments Regarding the Impropriety of Enforcing a *Gissel* Bargaining Order in Favor of a New and Different Union

In its Opposition Brief, the Solicitor General sidesteps Polymer's arguments regarding the impropriety of enforcing a *Gissel* bargaining order on behalf of a new and different union. The Solicitor General contends that Polymer failed to meet its burden of disproving the continuity of representation

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[2] The Board's denial of Polymer's Motion to Reopen because it was three days late seems especially unreasonable in light of the Board's four year delay in reaching a decision.

as established by the factors in *Western Commercial Transp., Inc.*, 288 N.L.R.B. 214 (1988). Opp. Br. at 12. This argument fails to adequately respond to the arguments presented in Polymer's Petition. The Solicitor General fails to address the fact that a *Gissell* bargaining order has never been enforced on behalf of a new and different union. In addition, *Western Commercial* does not address the continuity of representation issue in the context of a *Gissel* bargaining order. *Western Commercial,* 288 N.L.R.B. 214 (1988). However, *Western Commercial* does refer to a 1986 case from this Court which states that "the long-understood role of the Board regarding union affiliations is to determine whether the 'affiliation raises a question of representation and, if so, conduct an election to decide whether the certified union still is the choice of majority of the unit.'" *See id.* (citing *NLRB v. Financial Inst. Employees Local 1182,* 475 U.S. 192 (1986)). In *Financial Institution,* this Court also stated that changed circumstances may alter the relationship between the union and the employees it represents, which may raise the question of whether the affiliated union enjoys continued majority support. *See id.* As outlined in its Petition, Polymer has undergone a number of changes in its workplace since 1995, changes that certainly call UNITE's continued majority support into question.

Moreover, as stated in the Petition, we were unable to find any case where a *Gissel* bargaining order was enforced in favor of a union that is separate and distinct from the union selected by the employees. Pet. at 24. To date, both the Board and the Fifth Circuit have overlooked the potential injustice that could result if employees are forced to bargain with a union other than the one they selected. Polymer seeks certiorari from the Court to correct this error and establish clear precedent to avoid this error in the future.

IV. Conclusion

The significance of the questions presented in Polymer's Petition cannot and has not been denied. The Opposition Brief fails to establish that the issues presented in the *Polymer* decision are not ripe for review by the Court. Therefore, Polymer respectfully requests that the Court grant Polymer's Petition.

Respectfully submitted,

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